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Nos. 04-1244, 04-1352

In the Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR PETITIONERS JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.

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QUESTIONS PRESENTED

In *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court reversed a decision of the Seventh Circuit that had affirmed a civil judgment and nationwide injunction entered under the Racketeer Influenced and Corrupt Organizations Act (RICO) against various anti-abortion protesters. In reversing, this Court explained (*id.* at 411 (emphasis added in part)): "Because *all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed, the judgment* that petitioners violated RICO *must also be reversed.* Without an underlying RICO violation, the *injunction* issued by the District Court *must necessarily be vacated.*" On that basis, this Court determined that it "need not address the second question" on which certiorari had been granted, namely "whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964." *Ibid.*

The questions presented are:

1. Whether the Seventh Circuit, on remand, disregarded this Court's mandate by holding that "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the "judgment that petitioners violated RICO" was *not* necessarily reversed, and that the "injunction issued by the District Court" might *not* need to be vacated.

2. Whether the Hobbs Act, 18 U.S.C. § 1951(a), punishes acts or threats of physical violence against "any person or property" in a manner that "in any way or degree * * * affects commerce," even if such acts or threats of violence are wholly unconnected to either extortion or robbery.

3. Whether injunctive relief is available in a private civil action for treble damages brought under RICO, 18 U.S.C. § 1964(c).

RULE 24.1(b) AND 29.6 STATEMENT

Respondent National Organization for Women, Inc. (NOW) is a party to this action on behalf of itself and its women members as well as on behalf of a class of all other women "whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by [petitioners'] unlawful activities." 04-1244 Pet. App. 170a n.12. Other respondents here (plaintiffs below) are the Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., which appear on their own behalf as well as on behalf of a class of "all women's health centers in the United States at which abortions are performed." *Ibid.*

Petitioner Pro-Life Action League, Inc., has no parent corporation and does not issue stock to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 24.1(b) and 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. Factual and Procedural Background 2

B. This Court's Decision in *Scheidler II* 6

C. The Seventh Circuit's Decision on Remand 7

INTRODUCTION AND SUMMARY OF ARGUMENT 11

ARGUMENT 13

I. THE SEVENTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S CLEAR MANDATE 13

A. "All" Of The RICO Predicates "Must Be Reversed" 14

B. The "Judgment" Of Liability Under RICO "Must Also Be Reversed" 18

TABLE OF CONTENTS—Continued

Page

C. The Injunction "Must Necessarily Be Vacated" .. 19

II. THE HOBBS ACT DOES NOT MAKE ACTS OR THREATS OF VIOLENCE UNCONNECTED TO ROBBERY OR EXTORTION A FEDERAL CRIME 20

A. The Seventh Circuit's Interpretation Is Inconsistent With The Text, Structure, And Legislative History Of The Hobbs Act 20

B. The Seventh Circuit's Interpretation Should Be Rejected For Other Reasons As Well 27

C. The Seventh Circuit's Other Grounds For Concluding That The Hobbs Act Could Be Read As A General Anti-Violence Provision Were All Mistaken 32

III. RICO DOES NOT AUTHORIZE PRIVATE PLAINTIFFS TO SEEK INJUNCTIVE RELIEF ... 37

A. The Language And Structure Of 18 U.S.C. § 1964 Demonstrate That Private Plaintiffs Are Not Entitled To Injunctive Relief 37

B. Other Evidence In The Legislative History Confirms Congress's Intent Not To Allow Private Parties To Seek Injunctive Relief 45

C. Allowing Private Parties To Seek Injunctive Relief Under Section 1964(a) Would Vastly Expand The Scope Of Civil RICO 48

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

Cases:

Agency Holding Corp. v. *Malley-Duff & Assocs.*,
483 U.S. 143 (1987) ..... *passim*

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 45

Alexander v. *United States*, 509 U.S. 544 (1993) 32

Almendarez-Torres v. *United States*,
523 U.S. 224 (1998) 26

Amoco Prod. Co. v. *Village of Gambell*,
480 U.S. 531 (1987) 18

Ashwander v. *Tennessee Valley Authority*,
297 U.S. 288 (1936) 31

Associated Gen. Contractors of California, Inc. v.
California State Council of Carpenters,
459 U.S. 519 (1983) 39

Bell v. *United States*, 349 U.S. 81 (1955) 27

Bray v. *Alexandria Women's Health Clinic*,
506 U.S. 263 (1993) 18

California v. *American Stores Co.*,
495 U.S. 271 (1990) 39, 49, 50

Callanan v. *United States*,
364 U.S. 587 (1961) 27, 36

Caterpillar Inc. v. *Lewis*, 519 US. 61 (1996) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Chick Kam Choo v. *Exxon Corp.*,
486 U.S. 140 (1988) 19

Chickasaw Nation v. *United States*,
534 U.S. 84 (2001) 48

City of Sherrill v. *Oneida Indian Nation*,
125 S. Ct. 1478 (2005) 15

Cleveland v. *United States*, 531 U.S. 12
(2000) 27, 28, 31

D.R. Wilder Mfg. Co. v. *Corn Prods. Refining Co.*,
236 U.S. 165 (1915) 39

Geddes v. *Anaconda Copper Mining Co.*,
254 U.S. 590 (1921) 39

Graves v. *Cambria Steel Co.*,
298 F. 761 (N.Y. 1924) 50

Great-West Life & Annuity Ins. v. *Knudson*,
534 U.S. 204 (2002) 45

Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 31

Griffin v. *United States*, 502 U.S. 46 (1991) 19

H.J. Inc. v. *Northwestern Bell Tel. Co.*,
492 U.S. 229 (1989) 45

Holmes v. *SIPC*, 503 U.S. 258 (1992) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

In re Fredeman Litigation,
843 F.2d 821 (5th Cir. 1988) 44, 45

INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 48

Kaushal v. *State Bank of India*,
556 F. Supp. 576 (N.D. Ill. 1983) 44

Klehr v. *A.O. Smith Corp.*, 521 U.S. 179 (1997) 40

Lorillard Tobacco Co. v. *Reilly*,
533 U.S. 525 (2001) 26

Maryland v. *Baldwin*, 112 U.S. 490 (1884) 18, 19

Minnesota v. *Northern Securities Co.*,
194 U.S. 48 (1904) 38, 39, 50

Morales v. *Trans World Airlines, Inc.*,
504 U.S. 374 (1992) 19, 20

Morissette v. *United States*,
342 U.S. 246 (1952) 24

Muniz v. *Hoffman*, 422 U.S. 454 (1975) 24

NAACP v. *Claiborne Hardware Co.*,
458 U.S. 886 (1982) 31, 32

National Organization for Women, Inc. v. *Scheidler*,
510 U.S. 249 (1994) 1, 4

TABLE OF AUTHORITIES—Continued

Page(s)

National R.R. Passenger Corp. v. *National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974) 45

Ohio v. *Robinette*, 519 U.S. 33 (1996) 15

Paine Lumber Co. v. *Neal*, 244 U.S. 459 (1917) .. 38, 39, 42

Parks v. *Simpson Timber Co.*, 389 U.S. 909 (1967) 15

People v. *Di Stefano*, 38 N.Y.2d 640 (1976) 34

People v. *Mahboubian*, 74 N.Y.2d 174 (1989) 34

People v. *Rizzo*, 158 N.E. 888 (N.Y. 1927) 34

Ratzlaf v. *United States*, 510 U.S. 135 (1994) 28

Religious Tech. Ctr. v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987) 6, 48

Reno v. *Catholic Social Services, Inc.*, 509 U.S. 43 (1993) 15

Reves v. *Ernst & Young*, 507 U.S. 170 (1993) 44, 45

Rewis v. *United States*, 401 U.S. 808 (1971) 27

Rotella v. *Wood*, 528 U.S. 549 (2000) 40, 45

Russello v. *United States*, 464 U.S. 16 (1983) 48

TABLE OF AUTHORITIES—Continued

Page(s)

Scheidler v. *National Organization for Women, Inc.*,
537 U.S. 393 (2003) ..... *passim*

Sedima, S.P.R.L. v. *Imrex Co.*,
473 U.S. 479 (1985) 44, 46

Sedima, S.P.R.L. v. *Imrex Co.*,
741 F.2d 482 (2d Cir. 1984),
rev'd on other grounds, 473 U.S. 479 (1985) 46

Stirone v. *United States*,
361 U.S. 212 (1960) 9, 32, 33

Sunkist Growers, Inc. v. *Winckler & Smith*
Citrus Prods. Co., 370 U.S. 19 (1962) 18

Transamerica Mortgage Advisors, Inc. v. *Lewis*,
444 U.S. 11 (1979) 45

Union Trust Co. v. *Eastern Air Lines, Inc.*,
350 U.S. 962 (1956) 15

United States v. *Bass*, 404 U.S. 336 (1971) 31

United States v. *Carson*,
52 F.3d 1173 (2d Cir. 1995),
cert. denied, 516 U.S. 1122 (1996) 49

United States v. *Cook*, 384 U.S. 257 (1966) 24

United States v. *Cooper Corp.*,
312 U.S. 600 (1941) 39

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Culbert*, 435 U.S. 371 (1978) 25, 30

United States v. *DiGregorio*,
605 F.2d 1184 (1st Cir.),
cert. denied, 444 U.S. 937 (1979) 35, 36

United States v. *Enmons*, 410 U.S. 396 (1973) ..... *passim*

United States v. *Franks*, 511 F.2d 25
(6th Cir.), cert. denied, 422 U.S. 1042
(1975) 8, 20, 23

United States v. *Kemble*, 198 F.2d 889
(3d Cir.), cert. denied, 344 U.S. 893 (1952) 25

United States v. *Local 807*, 315 U.S. 521 (1942) 25

United States v. *Milton*, 1998 WL 468812
(4th Cir. Aug. 4, 1998) 9, 33

United States v. *Philip Morris*,
396 F.3d 1190 (D.C. Cir. 2005),
petition for cert. pending, No. 05-92 45

United States v. *Ryder*, 110 U.S. 729 (1884) 23

United States v. *Stephenson*,
895 F.2d 867 (2d Cir. 1990) 31

United States v. *Wilson*,
997 F.2d 208 (6th Cir. 1993) 36

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Yankowski*,
184 F.3d 1071 (1999) ..... *passim*

Vendo Co. v. *Lektro-Vend Corp.*,
433 U.S. 623 (1977) 39

Yates v. *United States*, 354 U.S. 298 (1957) 18

Statutes and Rules:

15 U.S.C. § 1 3

18 U.S.C. § 248 30

18 U.S.C. § 1951 ..... *passim*

18 U.S.C. § 1951(a) ..... *passim*

18 U.S.C. § 1951(b) 22

18 U.S.C. § 1951(b)(1) 35

18 U.S.C. § 1951(b)(2) 7, 28, 31

18 U.S.C. § 1952(b) 5

18 U.S.C. § 1961 ..... 3, 37

18 U.S.C. § 1961(1) 30

18 U.S.C. § 1961(1)(A) 5, 30

TABLE OF AUTHORITIES—Continued

	Page(s)
18 U.S.C. § 1962(a)	3, 4
18 U.S.C. § 1962(c)	3, 4, 5
18 U.S.C. § 1962(d)	3, 4
18 U.S.C. § 1963	3, 37
18 U.S.C. § 1963(a)	32
18 U.S.C. § 1964	*passim*
18 U.S.C. § 1964(a)	*passim*
18 U.S.C. § 1964(b)	*passim*
18 U.S.C. § 1964(c)	*passim*
18 U.S.C. § 1965	3, 37
18 U.S.C. § 1966	3, 37
18 U.S.C. § 1967	3, 37
18 U.S.C. § 1968	3, 37
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1651	1
Act of June 18, 1934, ch. 569, 48 Stat. 979	21, 26
Act of July 3, 1946, ch. 537, 60 Stat. 420	21

TABLE OF AUTHORITIES—Continued

Page(s)

Clayton Act, ch. 323, § 4, 38 Stat. 730 (1914) 38

Clayton Act, ch. 323, § 15, 38 Stat. 730 (1914) .. 41, 42, 44

Clayton Act, ch. 323, § 16, 38 Stat. 730 (1914) 39, 41

Law of July 2, 1890, ch. 647, § 4, 26 Stat. 209 ..... 41, 44

Law of July 2, 1890, ch. 647, § 7, 26 Stat. 209 38

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 37

Pub. L. No. 486, 60 Stat. 420 (1946) 21

N.Y. PENAL LAW § 530 (1909) 26

FED. R. CIV. P. 23(b)(2) 4

FED. R. CIV. P. 23(b)(3) 4

S. CT. RULE 14.1(a) 11, 15, 16

Miscellaneous:

18 U.S.C. App. (Reviser's Notes) (1948) 24, 25

78 CONG. REC. 5734 (1934) 27

78 CONG. REC. 451 (1934) 37

TABLE OF AUTHORITIES—Continued

Page(s)

89 CONG. REC. 3214 (1943) 37

89 CONG. REC. 3227 (1943) 26

91 CONG. REC. 11,903 (1945) 36

91 CONG. REC. 11,905 (1945) 36

91 CONG. REC. 11,908 (1945) 26, 36, 37

115 CONG. REC. 6995-96 (1969) 46

116 CONG. REC. 35,227-28 (1970) 47

116 CONG. REC. 35,346 (1970) 46, 47, 48

116 CONG. REC. 35,347 (1970) 47

118 CONG. REC. 29,368 (1972) 48

118 CONG. REC. 29,369-70 (1972) 48

118 CONG. REC. 29,379 (1972) 48

Barron, *The Judicial Code: 1948 Revision*, 8 F.R.D. 439 (1948-1949) 24

Batey, *Minority Report and the Law of Attempt*, 1 OHIO ST. J. CRIM. L. 689 (Spring 2004) 34

TABLE OF AUTHORITIES—Continued

Page(s)

Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts – Criminal and Civil Remedies*, 53 TEMPLE L.Q. 1009 (1980) 46

Bradley, *NOW v. Scheidler: RICO Meets The First Amendment*, 1994 SUP. CT. REV. 129 (1994) 34, 35

H.R. 19215, 91st Cong., 2d Sess. (1970) 46

H.R. 19586, 91st Cong., 2d Sess. (1970) 46

MODEL PENAL CODE (1962) 34

Note, *Protesters, Extortion and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999) 32

Organized Crime Control: House Hearings on S. 30 Before the House Comm. on the Judiciary, 91st Cong., 2d Sess. 520 (1970) 42, 43, 46

S. 1623, 91st Cong., 1st Sess. (1969) 46

S. 1861, 91st Cong., 1st Sess. (1969) 32

S. 2049, 90th Cong., 1st Sess. (1967) 46

S. 2248, 73d Cong., 2d Sess. (1934) 27

THE GODFATHER (Paramount Pictures 1972) 35, 36

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL (1997) 23

U.S. DEP'T OF JUSTICE, RACKETEERING INFLUENCED & CORRUPT ORGANIZATIONS: A MANUAL FOR FEDERAL PROSECUTORS (2000) 37, 49

OPINIONS BELOW

The opinion of the court of appeals denying rehearing (04-1244 Pet. App. 1a-24a) is reported at 396 F.3d 807. The previous order of the court of appeals on remand (04-1244 Pet. App. 25a-29a) from this Court is unreported. The earlier opinion of the court of appeals (*id.* at 30a-61a), which this Court reversed, is reported at 267 F.3d 687. The district court's opinion disposing of the motion to dismiss the third amended complaint (04-1244 Pet. App. 62a-140a) is reported at 897 F. Supp. 1047. The district court's opinion denying post-trial motions and entering an injunction (04-1244 Pet. App. 141a-174a) is unreported.

JURISDICTION

The court of appeals entered its order on remand on February 26, 2004, and denied rehearing on January 28, 2005. 04-1244 Pet. App. 1a, 25a. The petitions for certiorari were timely filed on March 16 and April 11, 2005, and granted in an order consolidating the two cases on June 28, 2005. This Court's jurisdiction rests on 28 U.S.C. § 1254(1). The Court also has jurisdiction over the first question presented under 28 U.S.C. § 1651. See 04-1244 Pet. 13-14 n.6.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Hobbs Act, 18 U.S.C. § 1951, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, and various federal and state statutes that were precursors of (or models for) the Hobbs Act or RICO, are set forth in an appendix to this brief (App., *infra*, 1a-8a).

STATEMENT

For 19 years, respondents have pursued this racketeering lawsuit against several individuals and organizations (petitioners here) that have engaged in or supported sit-ins and other political protests against abortion clinics. This Court has issued two opinions in the case. *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003) (*Scheidler II*); *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) (*Scheidler I*). In *Scheidler II*, the Court to all appearances

brought this case to an end by holding that the political protesters' mere interference with others' property or liberty interests, without any showing of wrongful "obtaining" of another's "property," does not constitute extortion in violation of the Hobbs Act. The Court therefore reversed the judgment of RICO liability, which had rested on 121 purported predicate acts. 537 U.S. at 397. This Court wrote that "*all* of the predicate acts supporting the jury's finding of a RICO violation must be reversed," "the judgment that petitioners violated RICO must also be reversed," and the injunction "must necessarily be vacated." *Id.* at 411 (emphasis added).

On remand, however, the Seventh Circuit disagreed. It held that four of the 121 predicate acts were unaffected by this Court's decision; that the judgment that petitioners violated RICO might remain intact after all; and that the nationwide injunction predicated on that judgment might also survive. The panel also concluded that the Hobbs Act might well criminalize the protesters' activities, advancing a reading of the statute that no appellate court has credited in the almost 60 years of the statute's existence. In its 2001 decision, the same panel had become the first appellate court in RICO's 30-plus-year existence to hold that a private plaintiff may secure injunctive relief under 18 U.S.C. § 1964. Reversal is required to enforce this Court's mandate, to correct the Seventh Circuit's unprecedented and misguided rulings, and to bring this litigation finally to an end.

A. Factual and Procedural Background

1. Petitioners Joseph Scheidler, Andrew Scholberg, and Timothy Murphy are individuals who oppose abortion on moral and religious grounds. Petitioner Pro-Life Action League, Inc. (PLAL), is a nonprofit Illinois corporation. Operation Rescue, the petitioner in No. 04-1352, is an unincorporated organization. Respondents the National Organization for Women, Inc. (NOW), Delaware Women's Health Organization, Inc. (DWHO), and Summit Women's Health Organization, Inc. (Summit), are, respectively, a national nonprofit organization

that supports the legal availability of abortion and two affiliated clinics that perform abortions.

In 1986, respondents initiated this lawsuit in the United States District Court for the Northern District of Illinois against petitioners (and various others who ceased to be defendants before trial). In their amended complaint, respondents asserted claims on behalf of two putative nationwide classes: all women's health centers at which abortions are performed (represented by DWHO and Summit); and (represented by NOW) all non-NOW members "whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by [petitioners'] unlawful activities." 04-1244 Pet. App. 170a n.12. See page ii, *supra*. Invoking a variety of novel theories of liability, virtually all of which would be shown over the next two decades of litigation to be legally invalid or factually unsupported, respondents alleged violations of the Sherman Act (15 U.S.C. § 1), RICO (18 U.S.C. §§ 1961-1968), and state law.

In their RICO claims, respondents alleged that petitioners had formed a loose association-in-fact of individuals and groups known as the Pro-Life Action Network (PLAN), united by a common ideological purpose of opposing abortion. They further alleged that PLAN was a RICO "enterprise" and that petitioners, by engaging in protests aimed at disrupting and closing abortion clinics, had directly or indirectly participated in the conduct of PLAN's activities through a "pattern" of "racketeering activity" (18 U.S.C. § 1962(c)). The pattern allegedly included acts of "extortion" in violation of the Hobbs Act, 18 U.S.C. § 1951. In addition to their Section 1962(c) claim, respondents alleged RICO claims for conspiracy (in violation of 18 U.S.C. § 1962(d)) and for deriving "income" from a pattern of racketeering activity (in violation of 18 U.S.C. § 1962(a)). Respondents' novel Section 1962(a) claim was based on petitioners' receipt of voluntary contributions from their political supporters, which respondents claimed was "income derived" from a pattern of racketeering activities because the supporters were motivated by petitioners' protest activities. Re-

spondents requested treble damages, costs, attorneys' fees, and (under the antitrust laws but not under RICO) an injunction.

The district court dismissed the complaint for failure to state a valid claim, 765 F. Supp. 937 (1991), and the Seventh Circuit affirmed, 968 F.2d 612 (1992). In upholding the dismissal of the antitrust claim, the court of appeals reasoned that the Sherman Act "was not intended to reach the activities of organizations espousing social causes." *Id.* at 618. In upholding the dismissal of the RICO claims under Sections 1962(c) and 1962(d), the Seventh Circuit held that RICO does not apply to defendants who commit "non-economic crimes * * * in furtherance of non-economic motives." *Id.* at 629.[1] This Court granted certiorari on the RICO "economic motive" issue, 508 U.S. 971 (1993), and reversed, 510 U.S. 249 (1994).

2. Following remand, respondents filed a third amended complaint. For the first time, they requested injunctive relief under RICO. In 1995, the trial court dismissed the claims against certain defendants, but not the remaining RICO claims against petitioners. 04-1244 Pet. App. 140a. The district court also held that respondents, as private parties, could obtain injunctive relief in a treble-damages action brought under RICO, 18 U.S.C. § 1964(c). 04-1244 Pet. App. 119a-122a.[2]

3. The case was tried from March 4 to April 20, 1998. Evidence was presented concerning numerous incidents spanning the nationwide conduct of petitioners and thousands of

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[1] On other grounds, the Seventh Circuit upheld the dismissal of respondents' RICO claim under 18 U.S.C. § 1962(a). See 968 F.2d at 623-24.

[2] Several years later, the district court certified the two classes described above. 172 F.R.D. 351, 363 (1997). The class of putative clinic patients who were not members of NOW sought only injunctive relief and was certified under Rule 23(b)(2); the clinic class, which also sought treble damages, was certified under Rules 23(b)(2) and (b)(3). See 172 F.R.D. at 362-63 & n.8. Thereafter certain defendants – including Operation Rescue but not the other petitioners – moved for summary judgment. In partially granting that motion, the court held that respondents had failed to raise any triable issue of fact on some of their more inflammatory claims, including alleged predicate acts of murder, kidnaping, and arson. 1997 WL 610782, at *18 (Sept. 23, 1997).

other abortion protesters over a 15-year period. 04-1244 Pet. App. 33a ("hundreds of acts").[3] The jury returned a verdict for respondents on their RICO claim under Section 1962(c).

The somewhat confusing verdict form can be read – favorably to respondents – to mean that the jury found that petitioners or unnamed persons "associated with PLAN" had committed 121 predicate acts under RICO: 21 "[a]cts or threats involving extortion against a[] patient, prospective patient, doctor, nurse, or clinic employee" in violation of the Hobbs Act, 18 U.S.C. § 1951; 25 violations of state extortion law; 25 acts of conspiracy to violate federal or state extortion law; 23 extortion-related violations of the Travel Act, see 18 U.S.C. §§ 1952(b), 1961(1)(A); 23 attempts to violate the Travel Act; and four acts or threats of physical violence to any person or property in violation of the Hobbs Act, 18 U.S.C. § 1951.[4] The

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[3] Consistent with its summary judgment ruling, the district court instructed the jury that there was "no claim in this case" that the "defendants themselves are responsible for" any "incident[] of murder, arson, and bombing." 04-1244 Pet. App. 178a (Tr. 4939). The court also ruled that respondents could not suggest to the jury that petitioners had committed arson or murders – a prohibition that respondents' counsel repeatedly violated in her opening statement, leading the judge at sidebar to admonish her to obey his ruling. See Tr. 534 (sustaining objection to references to bombing and burning of clinics, kidnaping, and death threats), 535 (same for references to bombers and arsonists), 539 (Court to respondents' counsel: "You know what the instructions are, and I expect you to abide by them"), 543 (Court to respondents' counsel: "There is to be no reference to arson or murder during the opening statements, period").

[4] The special verdict form allowed the jury to make a finding of whether petitioners ("or any other person associated with PLAN") committed not only acts or threats of "extortion" in violation of the Hobbs Act but also "[a]cts or threats of physical violence to any person or property." 04-1244 Pet. App. 191a; see also *id.* at 192a (asking jury to indicate whether any two or more of these acts were committed during a 10-year period and constituted a pattern of racketeering activity). As explained in our reply at the petition stage (at 7-8 & n.5, 8a-10a), petitioners clearly objected to this aspect of the special verdict form, but the trial court – in response to the argument of respondents' counsel that the Hobbs Act reaches freestanding acts or threats of violence – overruled the objection. See Tr. 4575-79. Also over petitioners'

jury awarded $31,455.64 to DWHO in damages and $54,471.28 to Summit; pursuant to RICO, the damages were trebled. The court later denied post-trial motions and entered a broad nationwide injunction regulating petitioners' future protest activities at abortion clinics. 04-1244 Pet. App. 141a-174a.

4. On appeal, a different panel affirmed. 04-1244 Pet. App. 30a-61a. In holding that injunctive relief is available to a private litigant under RICO, 18 U.S.C. § 1964(c), the panel disagreed with *Religious Tech. Ctr.* v. *Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987). 04-1244 Pet. App. 35a-43a. The panel also rejected petitioners' arguments that they could not have violated the Hobbs Act because, among other things, they had not "obtained" any "property" of the clinics, the doctors who worked there, or the clinics' customers. *Id.* at 58a-59a. The court asserted that the clinics' "intangible property * * * right to conduct a business" was "'property' under the Hobbs Act" and "[a] loss to, or interference with the rights of, the victim is all that is required." *Id.* at 59a (internal quotations omitted).

B. This Court's Decision in *Scheidler II*

This Court reversed, holding that petitioners' actions did not constitute extortion within the meaning of the Hobbs Act because petitioners had not wrongfully "obtained" any "prop-

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objections, the jury was instructed that "property" for purposes of all of the Hobbs Act counts broadly included "anything of value, including a woman's right to seek services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion, and fear." 04-1244 Pet. App. 182a. The supposed finding of 121 predicate acts assumes, counterfactually, that there was no overlap among the acts found to constitute several different categories of "extortion" (whereas respondents have conceded that there was in fact substantial overlap, see 01-1118 and 01-1119 Resp. Merits Br. 3 & n.4, 35 & n.45). That number also assumes, dubiously, that category 4(e) on the form – "[a]cts or threats of physical violence to any person or property" – constitutes and was intended to constitute a separate category of RICO predicate acts. The relevant jury instructions, as well as the special verdict form, are reprinted at 04-1244 Pet. App. 178a-195a.

erty" as required by 18 U.S.C. § 1951(b)(2). 537 U.S. at 402. The Court noted that the Hobbs Act drew its definition of extortion from the Penal Code of New York and the Field Code, a 19th-century model penal code. *Id.* at 403. Under New York law, "obtaining" property required both a deprivation and an acquisition of property. *Id.* at 403-04. The Court rejected the argument that "merely interfering with or depriving someone of property is sufficient to constitute extortion." *Id.* at 405.

A contrary holding, the Court emphasized, would extend the Hobbs Act to the separate crime of coercion, which "involves the use of force or threat of force to restrict another's freedom of action." 537 U.S. at 405. New York law had established coercion as a separate and lesser offense from extortion, and the Court determined that Congress "deci[ded] * * * to omit coercion" from the scope of the Hobbs Act. *Id.* at 406, 408. That decision – along with the rule of lenity – required reading the statute not to cover mere coercion. *Id.* at 409.

The Court then rejected all of the other predicate acts that had served as the basis for the RICO violation and the nationwide injunction. The Court ruled that the state-law extortion counts were legally defective, as were the 46 violations and attempted violations of the Travel Act. 537 U.S. at 409-10. The Court concluded that "*all* of the predicate acts supporting the jury's finding of a RICO violation must be reversed," and that, therefore, the RICO "judgment * * * must also be reversed" and the injunction "must necessarily be vacated." *Id.* at 411 (emphasis added). With no legal basis for a RICO injunction, the Court stated that it "need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964." *Ibid.*

C. The Seventh Circuit's Decision on Remand

1. One year after this Court's decision, the panel entered an unpublished order on remand. 04-1244 Pet. App. 25a-29a. The panel held that this Court's decision left undisturbed four predicate acts found by the jury – those involving "acts or threats of physical violence to any person or property" in pur-

ported violation of the Hobbs Act. In the panel's view, this Court could not "have found these four predicate acts insufficient to support the district court's injunction," because the only Hobbs Act question the Court had accepted for review was "'whether petitioners committed extortion within the meaning of the Hobbs Act.'" *Id.* at 28a (quoting 537 U.S. at 397).

The panel concluded that it was possible that the four supposedly surviving predicate acts might be "sufficient to support the nationwide injunction," and remanded that issue to the district court. 04-1244 Pet. App. 28a. The panel said nothing to reconcile its remand instructions with this Court's statements that the injunction "must necessarily be vacated" and that the underlying RICO judgment "must also be reversed." 537 U.S. at 411. The panel said that the district court "may need to determine whether the phrase 'commits or threatens physical violence to any person or property' constitutes an independent ground for violating the Hobbs Act or, rather, relates back to the grounds of robbery or extortion." 04-1244 Pet. App. 29a.

2. Petitioners sought rehearing, arguing, among other things, that the order on remand was at odds with the unambiguous mandate in *Scheidler II*, and that, alternatively, the court should decide whether the Hobbs Act reaches acts or threats of violence to property or persons unconnected to extortion or robbery. No appellate court, petitioners explained, had interpreted the statute as punishing freestanding acts or threats of violence to persons or property – and the Ninth Circuit has rejected that reading as "fatally flawed" and "without merit." *United States* v. *Yankowski*, 184 F.3d 1071, 1073-74 (1999); accord *United States* v. *Franks*, 511 F.2d 25 (6th Cir.), cert. denied, 422 U.S. 1042 (1975).

3. Panel and en banc rehearing were denied over three dissenting votes. 04-1244 Pet. App. 1a-24a. The panel offered no further explanation concerning how its remand order could be reconciled with *Scheidler II*. The panel stated that it had "nothing to add on that point to what we have already written," except to reiterate that this Court could not have reached these

four counts because "they were not included in the petitions for *certiorari*." 04-1244 Pet. App. 7a. Instead, the new opinion primarily addressed "whether the acts or threats of violence language in the Hobbs Act may serve as an independent predicate act under RICO." *Id.* at 7a-8a. The panel purported not to resolve that issue conclusively but devoted ten full pages to criticizing many of petitioners' arguments. *Id.* at 6a-15a.

Among other things, the panel suggested that the language of the Hobbs Act is ambiguous (04-1244 Pet. App. 8a):

> Whoever in any way or degree [1] obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or [2] attempts or conspires so to do, or [3] commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section* shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added). "[T]here are two possible interpretations" of the third clause, the panel stated, and "[t]he choice between [them] * * * is not obvious." 04-1244 Pet. App. 8a. Later the panel went even further, suggesting that reading the third clause as punishing freestanding acts or threats of violence would be to "take it at face value." *Id.* at 15a.

The panel quoted a sentence from *Stirone* v. *United States*, 361 U.S. 212 (1960), which observed that the Hobbs Act "speaks in broad language, manifesting a purpose to *use all the constitutional power Congress has* to punish interference with interstate commerce by extortion, robbery *or physical violence*." *Id.* at 215 (emphasis added). According to the panel, the quoted sentence "suggests that the Court saw three distinct types of predicate acts in the statute." 04-1244 Pet. App. 9a. The panel acknowledged that the Sixth and Ninth Circuits have rejected a violence-only reading of the Hobbs Act, *id.* at 11a, but the panel claimed a conflict between those decisions and the unpublished opinion in *United States* v. *Milton*, 1998 WL 468812 (4th Cir. Aug. 4, 1998), which neither party had cited.

Finally, the panel turned to the "legislative history." 04-1244 Pet. App. 15a. It acknowledged that the Hobbs Act, as enacted in 1946, "*explicitly linked* the 'acts of physical violence' clause to the prohibition on robbery and extortion." *Ibid.* (emphasis added). According to the panel, however, when Congress in 1948 approved a general revision and codification of the entirety of Title 18, it may have altered the Hobbs Act by expanding it to cover freestanding acts or threats of violence. The panel acknowledged that the 1948 "revisions were intended to be formal, stylistic changes," but suggested that "the revisers may have made certain substantive changes, either advertently or inadvertently." 04-1244 Pet. App.15a.

Despite its detailed discussion of the Hobbs Act's meaning, the panel purported not to reach a resolution of the issue. 04-1244 Pet. App. 6a-7a, 15a-16a. The panel also said it might be unnecessary for the district court to resolve the Hobbs Act issue. *Id.* at 7a-8a, 16a. "[O]nly if the district court concludes that some form of injunctive relief would be justified based on the four remaining predicate acts found by the jury," the panel said, will that court "have to confront" the Hobbs Act question. *Id.* at 7a. The panel emphasized the limited nature of what remained open on remand. "[I]t is too late in the day," the panel thus explained, "for the [respondents] to try to prove an entitlement to damages associated with" the four supposedly surviving Hobbs Act predicates. *Id.* at 7a. Respondents "had their chance to do so when the case was tried in the district court, and there is nothing in the Supreme Court's opinion that would justify reopening the original judgment on this point." *Ibid.* It is too late, the panel also held, "for plaintiffs to seek additional damages relief for acts they could have addressed at the original trial." *Id.* at 16a. Thus, the panel made clear that no damages can be awarded and that a new trial is not an available option.

4. Judge Manion, joined by Judge Kanne, dissented from the denial of rehearing en banc. 04-1244 Pet. App. 17a-24a.[5]

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[5] Chief Judge Flaum also voted to grant rehearing en banc, but he did not join the dissenting opinion.

In the dissenters' view, the panel's decision "directly conflicts with the Supreme Court's opinion," "rests on an impermissible reading of the Hobbs Act, and unnecessarily revives a case that is already more than eighteen years old." *Id.* at 19a.

INTRODUCTION AND SUMMARY OF ARGUMENT

A panel of the Seventh Circuit declined simply to carry out this Court's clear mandate in *Scheidler II* – and instruct the district court to enter judgment in petitioners' favor. The panel left open the possibility that four supposedly surviving predicate acts might state a violation of the Hobbs Act – and the district court might, on that basis, uphold the nationwide injunction it had issued (or reenter a narrower injunction). To reach that conclusion, the Seventh Circuit disregarded this Court's unambiguous mandate in *Scheidler II*, and endorsed theories of substantive criminal liability under the Hobbs Act and remedial authority under RICO that no appellate court had accepted in many decades of experience with those statutes. The decision below should be reversed with instructions to remand the case to the district court for entry of judgment in petitioners' favor.

I. *Scheidler II* made clear that "all" of the RICO predicates were "reversed"; that the judgment of liability under RICO "must also be reversed"; and that the injunction entered against petitioners "must necessarily be vacated." 537 U.S. at 411. The panel was wrong to second-guess those holdings as well as to ignore the significance of this Court's decision to avoid the RICO injunction issue in *Scheidler II*. The panel's reasons for looking behind this Court's clear commands rest on a misreading of this Court's opinion, a misunderstanding of how *Scheidler II* was litigated in this Court at the petition and merits stages, and an unduly restrictive view of this Court's practice of confining itself to issues that are "fairly included" within the questions presented (S. CT. RULE 14.1(a)). Beyond that, the panel's conclusion that the liability judgment and an injunction might somehow survive *Scheidler II* ignores well-settled

principles governing general verdicts that rest on multiple legal theories, where one or more of those theories is legally invalid.

II. The Hobbs Act does not criminalize acts or threats of physical violence wholly unconnected to either robbery or extortion. As the Seventh Circuit acknowledged, the text of the statute as enacted in 1946 unambiguously requires a connection to robbery or extortion. The panel erred in suggesting that Congress may have expanded criminal liability in 1948 when it adopted a revision and codification of all of Title 18. As this Court has repeatedly made clear, the strong presumption is that legislative revisions do *not* result in substantive changes, unless Congress clearly states otherwise. The Court has applied that presumption to the 1948 statute. Here, the accompanying Reviser's Notes confirm that no substantive change in criminal liability was intended.

Beyond that, the text and structure of Section 1951 as amended, as well as the legislative history of the Hobbs Act and its predecessor statute (the Anti-Racketeering Act of 1934), refute the Seventh Circuit's interpretation. The amended statute reaches acts or threats of violence only if undertaken "in furtherance of a plan or purpose to do anything in violation of this section" – a clear reference to the crimes of robbery or extortion previously set out in Section 1951. The clause prohibiting attempts and conspiracies, moreover, follows the same pattern by referring back to the crimes of robbery and extortion. In addition, Congress *twice* declined to create the crime the Seventh Circuit purported to locate in Section 1951 – in 1934, when it passed the Anti-Racketeering Act, and again in 1946, when it passed the Hobbs Act (which excluded the crime of coercion and expressly linked the violence clause to robbery or extortion). The Seventh Circuit's reading also violates the rule of lenity, conflicts with this Court's decisions involving the Hobbs Act (*Scheidler II* and *United States* v. *Enmons*, 410 U.S. 396 (1973)), is impossible to reconcile with the structure of the federal criminal code, threatens to federalize vast swaths of state criminal law (including almost all violent crime), and allows RICO to be misused against political and

labor protesters (again, contrary to Congress's intent). The reasons the Seventh Circuit offered for endorsing this novel construction of the Hobbs Act are all indefensible.

III. As this Court has repeatedly recognized, civil RICO was directly modeled on the federal antitrust laws. Specifically, Section 1964(c), which authorizes private civil lawsuits, is taken almost verbatim from a provision in the Clayton Act of 1914 (which in turn was modeled on a virtually identical provision in the Sherman Act of 1890). At the time RICO was enacted, this Court had interpreted the precursor Sherman Act provision *as not allowing private parties to seek injunctive relief.* Moreover, the text, structure, and legislative history of RICO all confirm that Congress intended to limit the relief available to private parties to the civil remedies specified in the statute: treble damages, costs and attorneys' fees. Allowing private injunctive relief would lead to a significant expansion of the scope of civil RICO by arming private litigants with a wide array of intrusive equitable remedies such as the appointment of monitors and trustees and even corporate dissolution.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S CLEAR MANDATE

This Court in *Scheidler II* unambiguously stated (537 U.S. at 411 (emphasis added in part)):

> Because ***all*** *of the predicate acts* supporting the jury's finding of a RICO violation *must be reversed, the judgment that petitioners violated RICO must also be reversed.* Without an underlying RICO violation, the *injunction* issued by the District Court ***must necessarily be vacated.*** We therefore need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964.

This Court's mandate established three points with unvarnished clarity: (1) "*all* of the predicate acts supporting" the finding of a RICO violation "must be reversed"; (2) the judg-

ment of RICO liability entered against petitioners "must be reversed"; and (3) the injunction predicated on the now-reversed judgment "must necessarily be vacated." It is useful to examine the Seventh Circuit's reasons for disagreeing with each point.

A. "All" Of The RICO Predicates "Must Be Reversed"

The jury's determination that petitioners violated RICO rested on a "pattern of racketeering activity" that consisted of two or more of the following 121 supposed predicate acts: 21 "[a]cts or threats involving extortion" in violation of the Hobbs Act, 18 U.S.C. § 1951; 25 violations of state extortion law; 25 acts of conspiracy to violate federal or state extortion law; 23 extortion-related violations of the Travel Act; 23 attempts to violate the Travel Act; and four acts or threats of physical violence to any person or property in violation of the Hobbs Act. 04-1244 Pet. App. 191a-192a. These 121 acts were "the predicate acts supporting the jury's finding of a RICO violation." 537 U.S. at 411. The Court left no doubt as to the disposition of the 121 RICO predicates, instructing that "all" of them "must be reversed." *Ibid.*

The panel gave several flawed reasons for disregarding this Court's holding concerning the proper disposition – reversal – of "all" of the 121 predicate acts. It first suggested that this Court's opinion "had nothing at all to say" about the four predicates in question. But the Court stated that "all" of the predicate acts found by the jury "must be reversed" – not "some," not "all the ones we have discussed," and certainly not "all but four." 537 U.S. at 411. The Court elsewhere made clear that its holding "with respect to extortion under the Hobbs Act" had the effect of "render[ing] insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." 537 U.S. at 397. The Court did not say that all of the "other bases or predicate acts" were invalidated *except for the four involving acts or threats of violence.*

As the dissenting judges correctly noted below, if there was any ambiguity in this Court's opinion, the proper course for respondents would have been "to seek rehearing from the

Supreme Court." 04-1244 Pet. App. 21a (dissenting opinion). Cf. *Parks* v. *Simpson Timber Co.*, 389 U.S. 909 (1967); *Union Trust Co.* v. *Eastern Air Lines, Inc.*, 350 U.S. 962 (1956). This they failed to do. Respondents should not be rewarded for their decision to take their chances with a panel that had ruled in their favor rather than ask for clarification by this Court.

In addition, the panel was wrong to suggest that the four acts of violence were *not* included in the petitions for certiorari.[6] On the contrary, both of the petitions for certiorari expressly referred to the four predicate acts involving "acts or threats of physical violence to any person or property in violation of the Hobbs Act." 01-1118 Pet. 5 n.3; see also 01-1119 Pet. 3-4 & nn.3-5. Indeed, the significance and status of these four predicate acts were debated by the parties at the petition stage. Thus, respondents argued that this Court should deny review of the Hobbs Act question because the jury found "4 violations of the Hobbs Act through acts or threats of physical violence," those predicate acts were "unchallenged" in the Supreme Court, and the case therefore was "an inappropriate vehicle for determining whether the Seventh Circuit's construction of the Hobbs Act was correct." 01-1118 and 01-1119 Br. in Opp. 5, 15.

In response, petitioners argued, among other things, that "*all* of the other predicate acts found by the jury" required "a showing of either 'robbery' (not alleged here) or 'extortion,'" because the Hobbs Act by its plain terms criminalizes acts or threats of violence *only* if they are committed "in furtherance of

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[6] The Court treats issues as "fairly included" (S. CT. RULE 14.1(a)) when consideration of them is a "predicate to an intelligent resolution of the question presented" (*Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996) (internal quotations omitted)), or they are "inextricably linked to * * * the questions presented." *City of Sherrill* v. *Oneida Indian Nation*, 125 S. Ct. 1478, 1490 n.8 (2005). To resolve a case properly, the Court may decide an issue that is only "touched on" in the parties' briefs, *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43, 58 n.18 (1993), or even overlooked by the parties entirely. See *City of Sherrill*, 125 S. Ct. at 1490 n.8 ("We resolve this case on considerations not discretely identified in the parties' briefs."); *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996).

a plan or purpose" to violate Section 1951. 01-1118 Cert. Reply Br. 7-8 & n.11 (emphasis added) (citing *United States* v. *Yankowski*, 184 F.3d 1071, 1073-74 (9th Cir. 1999)); accord 01-1119 Cert. Reply Br. 7 & n.13. Moreover, the Seventh Circuit's overbroad definition of "property" – which petitioners cited as a principal reason for granting review of the Hobbs Act issue (01-1118 Pet. 17-19) – applied with equal force to the four predicates involving acts or threats of violence against "property" or persons. For that reason as well, petitioners took the position in *Scheidler II* that these four predicate acts *were* "fairly included" (S. CT. RULE 14.1(a)).

At the merits stage, respondents shifted gears and made a strategic decision not only to *ignore* these four Hobbs Act predicates *but to treat them as inextricably tied to extortion*. Thus, although respondents included a detailed argument that the RICO judgment was valid and should be upheld "even apart from the Hobbs Act predicates," they pointedly did *not* argue that the judgment could stand because the jury found four Hobbs Act violations that were unrelated to extortion. 01-1118 and 01-1119 Resp. Merits Br. 33-35. In fact, faced with the jury's failure to specify which two or more of the 121 predicate acts constituted the requisite "pattern" of racketeering activity, respondents contended that the RICO judgment could stand "even apart from the Hobbs Act predicates" because "*all* of the acts that supported the jury's finding as to Hobbs Act violations" – including, of course, the four predicates at issue – *also* supported its findings as to state law [extortion] violations" (so that "the jury unquestionably would have found a pattern if only state extortion were at issue"). 01-1118 and 01-1119 Resp. Merits Br. 35. That argument, of course, *presupposed* that the four acts or threats of violence *were in fact related to extortion*.

Respondents' strategy helps explain why this Court in *Scheidler II* saw no need to state expressly that its resolution of the extortion issue also rendered the four violence counts legally insufficient. The Court quite properly would have assumed that the issue was simply no longer in dispute. See 04-1244 Pet. App. 21a (dissent) (because respondents at the merits stage "did

not argue that the four predicate acts of violence * * * independently justified the jury's verdict[,] * * * the Supreme Court found no need to expressly address that question").[7]

Moreover, even if the Hobbs Act question cannot be read as "fairly including" the four predicates at issue, the panel was wrong to presume that this Court did not go "beyond the scope of its grant of certiorari." 04-1244 Pet. App. 28a. It is *undeniable* that this Court *did* go beyond the scope of its grant of certiorari in *Scheidler II* – by resolving the legality of the state-law extortion counts and the Travel Act counts. Notably, the validity of the state-law extortion counts was raised as a *separate* issue in Operation Rescue's petition for certiorari, but the Court did not grant that issue. See 01-1119 Cert. Pet. i; 535 U.S. 1016 (2002). The Court nonetheless reached and resolved that issue, holding that the state-law extortion counts were legally defective.

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[7] For the same reason, the Court saw no reason to mention the four violence counts in its listing of the predicate acts that the jury had, "*inter alia*," found as potentially being included within the "pattern of racketeering activity." 537 U.S. at 399. Respondents' suggestion (Br. in Opp. 9, 15) that this Court somehow overlooked the existence of these four predicates is utterly implausible given the multiple references to the four predicates in the briefs at the petition and merits stages as well as at oral argument. See 04-1244 Pet. 15 (citing references); 04-1244 Petitioners' Reply Br. 3 n.1 (citing additional references); Oral Arg. Tr. 62. Many of these references were quite prominent, because respondents repeatedly sought to portray the protests giving rise to this litigation as violent, and petitioners repeatedly countered that the jury had found *only four* acts or threats of violence against people or property by unnamed participants in the protests. Respondents' contention that this Court's opinion is silent concerning these four predicates also ignores this Court's observation that "New York case law applying the coercion statute before the passage of the Hobbs Act involved the prosecution of individuals who, *like petitioners*, employed threats and acts of force *and violence* to dictate and restrict the actions and decisions of businesses." 537 U.S. at 405-06 (emphasis added). Thus, the panel was wrong to say that this Court's opinion "makes no mention of these four predicate acts." 04-1244 Pet. App. 5a. Any suggestion that this Court overlooked these four predicates was, in any event, properly directed to this Court in a rehearing petition.

B. The "Judgment" Of Liability Under RICO "Must Also Be Reversed"

"[T]he judgment that petitioners violated RICO must also be reversed." 537 U.S. at 411. Despite this clear instruction, the Seventh Circuit suggested that the liability judgment against petitioners might survive if the district court, on remand, ruled that the Hobbs Act reaches freestanding acts or threats of violence. 04-1244 Pet. App. 4a-5a. That is the inescapable import of the panel's statement that the district court should "determine whether the four predicate acts * * * are sufficient to support the nationwide injunction that it imposed." *Id.* at 5a. No injunction could be entered in the absence of a judgment that petitioners violated RICO in the first place. See *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 546 n.12 (1987).

There is, however, no ambiguity in this Court's direction that the liability judgment "must also be reversed." 537 U.S. at 411. When this Court wants to reverse a judgment only in part, it says so – which it did not do here. See, *e.g.*, *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993) ("It may be, of course, that even though the District Court had jurisdiction over the state-law claims, judgment on those claims alone cannot support the injunction that was entered. We leave that question for consideration on remand."). And, if there had been any possibility that the finding of a RICO violation could have survived and the district court's injunction upheld on an alternative basis, this Court would not have stated that it need not address the second question presented. 537 U.S. at 411.

The panel's suggestion that the liability judgment might somehow survive this Court's decision in *Scheidler II* is wrong *even if* this Court did *not* dispose of the four "violence-only" predicates. Under settled precedent, a general verdict that might have rested on legal error – as where one of several alternative liability theories that was charged is legally defective – must be reversed. See *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962); *Yates* v. *United States*, 354 U.S. 298 (1957); *Maryland* v. *Baldwin*, 112

U.S. 490, 493 (1884); see also *Griffin* v. *United States*, 502 U.S. 46, 56, 58-59 (1991).[8] This Court recognized this fatal defect in the general verdict that petitioners violated RICO. See 537 U.S. at 401 n.5; see also 04-1244 Pet. App. 22a n.2 (dissent) (noting absence of requisite finding by jury that these four predicate acts satisfied the Hobbs Act's jurisdictional element).

C. The Injunction "Must Necessarily Be Vacated"

"Without an underlying RICO violation, the injunction issued by the District Court *must necessarily be vacated*." 537 U.S. at 411 (emphasis added). Despite this clear command, the panel stated that the district court on remand should "determine whether the four predicate acts * * * are sufficient to support the nationwide injunction that it imposed." 04-1244 Pet. App. 5a. In denying the petitions for rehearing, the panel also suggested that the district court might consider whether the four predicates "could support *a more narrow* injunction." *Id.* at 6a (emphasis added). The opinion on rehearing left open the possibility that the district court might conclude that its original injunction be continued, while at the same time offering that "it appears that it would be an abuse of discretion for the district court to re-enter *any* nationwide injunction based only on the four remaining acts." *Id.* at 16a (emphasis added).

As the dissenting judges observed, the panel's suggestion that the district court's original injunction might survive or be "re-enter[ed]" following remand "directly conflicts with the Supreme Court's opinion." 04-1244 Pet. App. 16a, 19a. The injunction, this Court made clear, "must necessarily be vacated." 537 U.S. at 411.[9] Had there been any possibility that the

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[8] This rule was brought to the Court's attention in *Scheidler II*. See 01-1118 Pet. Merits Br. 17 n.12; 01-1118 Pet. Merits Reply Br. 13-14. At oral argument, the Court asked the Solicitor General whether the judgment could stand and he agreed that, under these cases, it could not. See Oral Arg. Tr. 30-31.

[9] When the Court recognizes that there are alternative grounds on which an injunction might be sustained on remand, or that further fact-finding is required, it typically says so when it vacates the injunction. See, *e.g.*, *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 151 (1988); *Morales* v. *Trans*

injunction might survive in any form, this Court would not have avoided the issue of injunctive relief under RICO.

II. THE HOBBS ACT DOES NOT MAKE ACTS OR THREATS OF VIOLENCE UNCONNECTED TO ROBBERY OR EXTORTION A FEDERAL CRIME

The Hobbs Act makes it a felony punishable by imprisonment for up to 20 years "in any way or degree [to] obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce" by acts of extortion or robbery (or through attempts or conspiracies to commit extortion or robbery). 18 U.S.C. § 1951(a). It also proscribes any act or threat of "physical violence to any person or property" that is done "in furtherance of a plan or purpose *to do anything in violation of this section*." *Ibid.* (emphasis added). Relying on the assumption that obstructing, delaying or affecting commerce could be a "violation of this section" (see 04-1244 Pet. App. 8a, 10a, 14a), the Seventh Circuit held that the Hobbs Act could reasonably be interpreted as proscribing violence (or threats of violence) that affect interstate commerce but are unconnected to either extortion or robbery. In the 59 years since the Hobbs Act was enacted, no appellate court has endorsed that far-reaching and countertextual reading – and two circuits have rejected it. *United States* v. *Yankowski*, 184 F.3d 1071, 1072, 1073 (9th Cir. 1999); *United States* v. *Franks*, 511 F.2d 25, 31 (6th Cir. 1975). As we explain below, the Seventh Circuit's reading is wrong for multiple reasons.

A. The Seventh Circuit's Interpretation Is Inconsistent With The Text, Structure, And Legislative History Of The Hobbs Act

1. An examination of the text of the Hobbs Act – both as originally enacted in 1946 and as subsequently amended – makes very clear that it was never intended to criminalize freestanding acts or threats of violence. The Hobbs Act was passed in 1946 as a substitute for the Federal Anti-Racketeering

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World Airlines, Inc., 504 U.S. 374, 382 (1992).

Act of 1934. See Act of July 3, 1946, ch. 537, 60 Stat. 420 (App., *infra*, 2a-3a); Act of June 18, 1934, ch. 569, 48 Stat. 979 (App., *infra*, 3a-4a). As originally enacted, the Hobbs Act included a first section that defined "commerce," "robbery," and "extortion" and then provided in pertinent part as follows:

> SEC. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> SEC. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> SEC. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> SEC. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of section 2* shall be guilty of a felony.

Pub. L. No. 486, 60 Stat. 420 (1946) (emphasis added).

The italicized language says that acts or threats of "physical violence to any person or property" under Section 5 are punishable only if done "in furtherance of a plan or purpose to violate" Section 2 – to violate, in other words, the proscription stated in Section 2 against interfering with commerce by either extortion or robbery. As the panel was constrained to admit, then, the Hobbs Act, as enacted in 1946, "explicitly linked the 'acts of physical violence' clause to the prohibition on robbery and extortion." 04-1244 Pet. App. 15a.

The Seventh Circuit, however, suggested that Congress may have altered this meaning and created new felony offenses when, in 1948, it approved a general revision and codification of the entirety of Title 18. As revised in 1948 and subsequently amended, the Hobbs Act provides in pertinent part:

> Whoever in any way or degree [1] obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or [2] attempts or conspires so to do, or [3] commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section* shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added).

The panel acknowledged that the 1948 "revisions were intended to be formal, stylistic changes," but suggested that the meaning of the statute *did* change in 1948. 04-1244 Pet. App. 15a. That conclusion is incompatible with the statutory text. The Hobbs Act, as amended, punishes only acts or threats of "physical violence to any person or property" that are "in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. § 1951(a). The rest of "this section" – Section 1951 – obviously deals with the interference with interstate commerce by acts connected to either robbery or extortion.

The structure of Section 1951(a) confirms this commonsense reading. As the language quoted above makes clear, Section 1951(a) consists of three clauses (represented by the bracketed numbers that have been added to the quotation). Each begins with a verb or series of verbs cast in the present tense; each modifies the word "whoever." The second clause – which independently punishes attempts and conspiracies – refers back to and is entirely dependent on the first clause (which sets forth the primary offenses of robbery or extortion). In like manner, the third clause refers back to the first clause and the primary offenses of robbery or extortion. The primacy of robbery and extortion is further confirmed by the fact that those terms are specifically defined in Section 1951(b) – whereas the ancillary "physical violence" offense in the third clause is not. Only by ignoring this structural evidence and the parallelism of the verbs used in Section 1951 could the Seventh Circuit have concluded that the principal offense targeted by the Hobbs Act was

interference with commerce (with "by robbery or extortion" being one of three alternative means of carrying out that crime). Contrary to the Seventh Circuit's assumption, "obstruct[ing], delay[ing], or affect[ing] commerce" does not constitute a "violation of this section" within the meaning of third clause.

Other appellate courts have not made the same mistake. As the Ninth Circuit explained, "The statutory language is clear: A person may violate the Hobbs Act by committing or threatening a violent act against person or property, but only if it is in furtherance of a plan to interfere with commerce *by extortion or robbery*." *Yankowski*, 184 F.3d at 1073 (emphasis in original).

In an official publication to guide federal prosecutors, the Justice Department has recognized that the Hobbs Act does not reach freestanding acts or threats of violence:

> The statutory prohibition of "physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section" *is confined to violence for the purpose of committing robbery or extortion. United States v. Franks*, 511 F.2d 25, 31 (6th Cir. 1975) (rejecting the view that the statute proscribes all physical violence obstructing, delaying, or affecting commerce as contrasted with violence designed to culminate in robbery or extortion).

U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 2402 (1997) (emphasis added) (available at <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02402.htm>).

2. The Seventh Circuit's suggestion that Section 1951(a) could be read to have a different meaning than its source – the 1946 Hobbs Act – is also flatly inconsistent with this Court's decisions. This Court has long recognized that it "will *not* be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention *be clearly expressed*." *United States* v. *Ryder*, 110 U.S. 729, 740 (1884) (emphasis added). Congress itself "recognized this rule by including in its reports the complete Reviser's Notes to each

section in which are noted all instances where change is intended and the reasons therefor." Barron, *The Judicial Code: 1948 Revision*, 8 F.R.D. 439, 446 (1948-1949); see also *Muniz* v. *Hoffman*, 422 U.S. 454, 469, 474 (1975). This Court's decisions have repeatedly applied that interpretive canon to the 1948 revisions of Title 18. See, *e.g.*, *Muniz*, 422 U.S. at 468-70, 474; *United States* v. *Cook*, 384 U.S. 257, 260 (1966); *Morissette* v. *United States*, 342 U.S. 246, 269, n.28 (1952) ("The 1948 Revision was not intended to create new crimes but to recodify those then in existence."). Under these settled principles, no substantive change in the law was brought about by the 1948 revisions unless the detailed Reviser's Notes indicate that "a substantive change in the law was contemplated." *Muniz*, 422 U.S. at 474. The Seventh Circuit thus got it backwards in attaching significance to the fact that, as far as it could tell, Congress had "never affirmatively negated" the panel's preferred reading of the Hobbs Act. 04-1244 Pet. App. 15a.

Significantly, the Reviser's Notes in no way suggest an intent to alter the substantive scope of the Hobbs Act's provisions. See 18 U.S.C. App. (Reviser's Notes) 2444, 2591-92 (1948). On the contrary, they make clear that the revised Section 1951 merely "consolidate[d] sections 420a–420e-1 of title 18, U.S.C., 1940 ed." – the provisions that codified the Anti-Racketeering Act of 1934, which the Hobbs Act amended – and did so "with changes in phraseology and arrangement necessary to effect consolidation." 18 U.S.C. App. (Reviser's Notes), at 2591. The balance of the Reviser's Notes relating to Section 1951 provide these comments on specific changes:

> Provisions designating offense as felony were omitted as unnecessary in view of definitive section 1 of this title. (See reviser's note under section 550 of this title.)
>
> Subsection (c) of the revised section is derived from title II of the 1946 amendment. It substitutes references to specific sections of the United States Code, 1940 ed., in place of references to numerous acts of Congress, in conformity to the style of the revision bill. Subsection (c)

> as rephrased will preclude any construction of implied repeal of the specified acts of Congress codified in the sections enumerated.
>
> The words "attempts or conspires so to do" were substituted for sections 3 and 4 of the 1946 act, omitting as unnecessary the words "participates in an attempt" and the words "or acts in concert with another or with others," in view of section 2 of this title which makes any person who participates in an unlawful enterprise or aids or assists the principal offender, or does anything towards the accomplishment of the crime, a principal himself.
>
> Words "shall, upon conviction thereof," were omitted as surplusage, since punishment cannot be imposed until a conviction is secured.

Id. at 2591-92. Thus, there is nothing in the Reviser's Notes to suggest an intent to dispense with the requirement that acts or threats of violence be in furtherance of robbery or extortion. See also *United States* v. *Kemble*, 198 F.2d 889, 889 n.1 (3d Cir.), cert. denied, 344 U.S. 893 (1952) (1948 statute "reenacted" the "substance" of the 1946 statute "without consequential change").

3. Several additional factors provide further support for reading Section 1951 as prohibiting only those threats or acts of violence committed in furtherance of a plan or purpose to interfere with commerce by robbery or extortion.

First, as this Court has explained, Congress's purpose in enacting the Hobbs Act was not only to "delete[]" an "exception" to the predecessor Anti-Racketeering Act that had been recognized by this Court in *United States* v. *Local 807*, 315 U.S. 521 (1942), but also to "substitute[] specific prohibitions on robbery and extortion" as those crimes were defined under New York law "for the Anti-Racketeering Act's language relating to the use of force or threats of force." *United States* v. *Culbert*, 435 U.S. 371, 377 (1978); see also *id.* at 377-78 (collecting evidence of Congress's intent, which was "to prohibit robbery or extortion perpetrated by anyone"). Toward

that end, Congress not only specifically tied the "physical violence" clause to the core proscriptions against robbery and extortion but also made a "decision to * * * omit coercion" from the scope of the statute. 04-1244 Pet. App. 9a; accord *Scheidler II*, 537 U.S. at 403, 405-06. As the panel acknowledged (04-1244 Pet. App. 9a, 10a), the crime of coercion under New York law included certain wrongful uses of "violence" or "threat[s]" of violence against "person[s]" or "property," even if wholly unconnected to either extortion or robbery. See also *Scheidler II*, 537 U.S. at 405 n.10 (quoting definition of coercion in N.Y. PENAL LAW § 530 (1909)); App., *infra*, 4a (reprinting § 530). The panel's interpretation of Section 1951 is thus contrary to Congress's intent to target robbery and extortion and to exclude from the Hobbs Act conduct unrelated to robbery or extortion that was punishable as coercion under New York law. 537 U.S. at 405-08.[10]

Second, Congress's intent not to criminalize freestanding acts or threats of violence against persons or property is equally apparent from the legislative history of the 1934 Act. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 232–33 (1998) (relying on previous version of criminal statute to interpret the current version); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 526 (2001) (same). As enacted, the 1934 Act covered acts and threats of physical violence only if committed "in furtherance of a plan or purpose to violate" the proscriptions against the wrongful obtaining of another's property or wrongful compelling of another's "payment of money or other valuable consideration[]" or "purchase or rental of property or protective services." 48 Stat. 979, § 2(c); see App., *infra*, 3a-4a

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[10] The congressional debates involving the Hobbs Act and a predecessor bill contain further evidence that Members were aware that the statute would reach violence only if it was committed in furtherance of robbery or extortion. See, *e.g.*, 91 CONG. REC. 11,908 (1945) ("[A] mere threat does not constitute a crime. There must accompany that threat an unlawful taking."); 89 CONG. REC. 3227 (1943) ("Let us remember that we are not attempting to forbid all kinds of violence. We are trying to make a legal definition of racketeering.").

(reprinting 1934 Act); *Yankowski*, 184 F.3d at 1073 n.5. Moreover, the final version of the 1934 Act substantially narrowed the original bill's language, which would have made it a crime to "commit[] or threaten[] to commit any act of violence * * * to a person or property" in "connection with or in relation to any act in any way * * * affecting * * * commerce." S. 2248, 73d Cong., 2d Sess. § 2(1) (1934) (reprinted at 78 CONG. REC. 5734); see also *Callanan* v. *United States*, 364 U.S. 587, 590 n.4 (1961).

Thus, Congress *twice* declined to create the crime the Seventh Circuit purported to locate in the Hobbs Act – in 1934 and again in 1946. In light of this history, the panel's suggestion that Congress "advertently or inadvertently" intended to expand the Hobbs Act in 1948 (04-1244 Pet. App. 15a) is utterly implausible. Congress did not create this crime in a nonsubstantive, general revision and recodification of Title 18 in 1948.

B. The Seventh Circuit's Interpretation Should Be Rejected For Other Reasons As Well

The Seventh Circuit's reading of Section 1951 suffers from many additional flaws: it ignores the rule of lenity, conflicts with this Court's decisions involving the Hobbs Act, cannot be reconciled with the structure of the federal criminal code, could federalize vast expanses of state criminal law, and allows RICO to be misused against political and labor protesters.

1. Even if our reading of Section 1951(a) is not compelled by the foregoing evidence (and we believe that it is), our view is at the very least a reasonable one. The panel itself called our reading a "possible" one and said that the text of Section 1951 "can be read either way." 04-1244 Pet. App. 8a. "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) (citing *Bell* v. *United States*, 349 U.S. 81, 83 (1955)). That rule of lenity applies with full force to the substantive (as opposed to jurisdictional) provisions of the Hobbs Act. *Scheidler II*, 537 U.S. at 408-09 (applying rule of lenity to definition of extortion). As the Court recognized in *Cleveland*

v. *United States*, 531 U.S. 12, 25 (2000), "[t]his interpretive guide is especially appropriate" in construing the Hobbs Act, because, like the mail fraud statute at issue in that case, the Hobbs Act "is a predicate offense under RICO." Accord *Scheidler II*, 537 U.S. at 411-12 (Ginsburg, J., joined by Breyer, J., concurring). The rule of lenity should be dispositive here.[11]

2. The panel's analysis also is inconsistent with two of this Court's decisions involving the Hobbs Act. First, *United States* v. *Enmons*, 410 U.S. 396 (1973), reversed the Hobbs Act convictions of labor union officials and members who had engaged in acts of violence and destruction of property during a campaign to induce an employer to agree to a union contract. Although the defendants had fired high-power rifles at the employer's facility, and even blown up a company transformer, this Court ruled that they had *not* violated the Hobbs Act. The Court reasoned that there was no "obtaining of property of another" through "wrongful" means (18 U.S.C. § 1951(b)(2)) – part of the definition of "extortion" – because the defendants had acted to further "legitimate union objectives, such as higher wages in return for genuine services." 410 U.S. at 400.

If the Seventh Circuit is correct, however, then the conduct in *Enmons* violated the Hobbs Act after all. If the "physical violence" clause of the Hobbs Act is freestanding, and need not have any connection to extortion or robbery, then it would not include "wrongful" "obtaining" as an element and the Hobbs Act would apply with full force to acts or threats of violence occurring during labor protests. Nor can there be any doubt that the acts of physical violence that were proven in *Enmons* "in

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[11] The panel mistakenly suggested that the rule of lenity applies only if one of the two interpretations threatened to federalize traditional state crimes. 04-1244 Pet. App. 12a (incorrectly stating that our "rule of lenity * * * argument is premised on the doomsday scenario they foresee if the Act is read to permit three independent predicate acts"). In fact, the rule of lenity requires the narrower of two reasonable interpretations, even if neither reading threatens to federalize traditional state crimes. See, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 148-49 (1994). And, of course, the panel's reading *does* threaten to federalize traditional state crimes. See pages 30-31, *infra*.

any way or degree * * * affect[ed] commerce" (18 U.S.C. § 1951(a)). Yet this Court noted that in 30 years no reported case had upheld the use of the Hobbs Act against violence occurring on the picket line – even though during this period "the Nation has witnessed countless economic strikes, often unfortunately punctuated by violence." 410 U.S. at 408-10. And this Court rejected the government's "broad" reading of the Hobbs Act as punishing "[t]he worker who threw a punch on a picket line" by "20 years' imprisonment and a $10,000 fine" as contrary to the rule of lenity and "an unprecedented incursion into the criminal jurisdiction of the States." *Id.* at 410. The same is true of respondents' position in this case.

Second, as noted above, the panel's decision is inconsistent with the *reasoning* of *Scheidler II*. This Court's holding that the crime of extortion under the Hobbs Act does not include mere interference with (as opposed to obtaining) of property rights rested, in large part, on the ground that Congress intended to exclude the crime of coercion from the Hobbs Act's coverage – and interference with property rights (without any obtaining) constituted coercion under New York law. See 537 U.S. at 409 (distinction between coercion and extortion "controls these cases"). The same logic, however, dooms the argument that the Hobbs Act reaches freestanding acts or threats of violence aimed at compelling businesses, customers, or employees to refrain from exercising property or liberty rights (but not at obtaining the victim's property). The panel acknowledged both that "the New York Penal Code defined coercion to include acts or threats of violence against persons or property" and that "Congress affirmatively chose not to list 'coercion' as a separate ground for Hobbs Act liability" (04-1244 Pet. App. 10a), but it refused to accept the conclusion that flows from those propositions. The panel's only explanation for that dereliction was to observe that this Court in *Scheidler II* was "not addressing the analytically distinct question" of the existence of a violence-only crime. *Ibid.* That is true but irrelevant to whether *Scheidler II*'s *reasoning* dooms respondents' interpretation of the Hobbs Act. Nor did the panel give any explanation for why

a Congress that took pains to exclude coercion from the definition of "extortion" would have meant to punish certain acts of coercion in another part of the statute. See *Culbert*, 435 U.S. at 378 (rejecting as "inconceivable" the notion that, "at the same time Congress was so concerned about clearly defining the acts prohibited under the bill," it intended to impose a limitation nowhere mentioned in statute's text).

3. The Seventh Circuit's interpretation of the Hobbs Act cannot be reconciled with the structure of the federal criminal code. As the *amicus* brief of Alabama and other States notes, the Hobbs Act as interpreted by the lower court effectively renders superfluous a wide array of other federal criminal statutes – including the Freedom of Access to Clinic Entrances Act of 1994 ("FACE Act"), which specifically addresses actual and attempted destruction or damage of clinic property, and prescribes penalties much less severe than those available under the Hobbs Act. See 18 U.S.C. § 248; *Amicus* Br. of Alabama *et al.* (merits stage), at 10-12 (listing numerous other examples, including destroying an airplane or motor vehicle and assaulting a federal officer) ("States' *Amicus* Br."). Moreover, the Seventh Circuit's reading would work a significant expansion of RICO, which specifies various crimes that qualify as predicate acts of racketeering. See 18 U.S.C. § 1961(1). Those predicates do not include, however, crimes such as assault or destruction of an airplane or violations of the FACE Act – any of which could be easily repackaged as a Hobbs Act offense under the lower court's view. On the other hand, Congress *did* include as RICO predicates certain *inherently* violent crimes – such as state-law "murder" (18 U.S.C. § 1961(1)(A)) – which would have been wholly unnecessary if the Hobbs Act already covered acts of physical violence against people.

4. The Seventh Circuit's interpretation also could federalize all manner of traditional state offenses – such as assault and malicious destruction of property – into Hobbs Act violations punishable by 20-year sentences. Indeed, if the Seventh Circuit is correct, Congress has federalized essentially all violent crime. Courts must not be "quick to assume that Congress has meant

to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States* v. *Bass*, 404 U.S. 336, 349 (1971); see also *Cleveland*, 531 U.S. at 24.

Federalism concerns are heightened because the Hobbs Act regulates the activities of state and local government officials. See 18 U.S.C. § 1951(b)(2) (defining extortion to include the "obtaining of property from another * * * under color of official right"); *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). There is no reason to suggest that Congress intended to exempt such officials from the clause prohibiting acts or threats of violence "in furtherance of a plan or purpose" to engage in official extortion. See 18 U.S.C. § 1951(a) (broadly referring to "[w]hoever" violates proscriptions); *United States* v. *Stephenson*, 895 F.2d 867, 871-73 (2d Cir. 1990) (holding that Hobbs Act applies to federal officials). Accordingly, the third clause in the Hobbs Act applies to state and local officials and, if the Seventh Circuit is correct, freestanding acts or threats of violence against property or people is a federal felony when committed by state and local officials. As the state *amici* point out, the practical consequences of that interpretation are staggering. See States' *Amicus* Br. 1, 16-17.[12]

5. Finally, if the Seventh Circuit's interpretation were correct, RICO actions based on predicate Hobbs Act offenses could be pursued against social and labor protesters of all stripes, at least if acts (or perceived threats) of violence or property damage occur during protests. See *Enmons*, 410 U.S. at 410 (noting that "the Nation has witnessed countless economic strikes, often unfortunately punctuated by violence"). Especially in light of RICO's broad concepts of enterprise liability, allowing threats of property damage to be a RICO predicate could place at risk a wide array of political and labor protesters. See *NAACP* v.

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[12] As the state *amici* also correctly note, the Seventh Circuit's interpretation of the Hobbs Act as a general anti-violence provision should also be rejected because it raises serious constitutional issues. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring). See States' *Amicus* Br. 17-20 & n.8 (discussing issues raised under the Commerce Clause and Domestic Violence Clause).

Claiborne Hardware Co., 458 U.S. 886, 888, 920 (1982) (noting "looseness and pliability" of liability for concerted action and conspiracy and holding, in context of boycott of white merchants, that First Amendment precludes imposition of civil liability "merely because an individual belonged to a group, some members of which committed violence").[13]

C. The Seventh Circuit's Other Grounds For Concluding That The Hobbs Act Could Be Read As A General Anti-Violence Provision Were All Mistaken

The panel cited three additional reasons for its radical break from tradition. None is valid.

1. The panel purported to find support for its interpretation of Section 1951 in one sentence in *Stirone* v. *United States*, 361 U.S. 212 (1960), observing that the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress had to punish interference with interstate commerce by extortion, robbery or physical violence." *Id.* at 215. But the panel's reliance on this sentence ignores this Court's clarification, in *Scheidler II*, that the sentence in question did *not* adopt a broad interpretation of the substantive provisions of the Hobbs Act but rather related only to the commerce element. See 537 U.S. at 408. Even before *Scheidler II*,

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[13] There are at least three additional reasons to doubt that Congress intended the Hobbs Act to be used in conjunction with RICO against political protesters. *First*, as the legislative history of RICO makes clear, an early version of the statute was narrowed in response to concerns expressed by the Justice Department and ACLU that it was too broad and might be applied to anti-war protesters. Note, *Protesters, Extortion and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 696-97 (1999). Tellingly, the early version that was rejected would have defined racketeering activity to include acts involving "the danger of violence to life, limb or property." S. 1861, 91st Cong., 1st Sess. § 2(a) (1969). *Second*, it is difficult to see why Congress in 1994 would have enacted the FACE Act if it believed that RICO, combined with the Hobbs Act, *already* reached physical damage to clinic property. And *third*, RICO's severe criminal penalties and forfeiture provisions, and its quasi-punitive provision for treble damages, make its application to political protesters singularly inappropriate. 18 U.S.C. § 1963(a); *Alexander* v. *United States*, 509 U.S. 544 (1993).

the Ninth Circuit had correctly rejected the panel's reading of this sentence in *Stirone*. *Yankowski*, 184 F.3d at 1074. Nor was there any reason for this Court in *Stirone* to comment on the third clause of Section 1951, since the case involved a prosecution for extortion.

2. The panel also purported to find support in an unpublished decision of the Fourth Circuit, *United States* v. *Milton*, 1998 WL 468812 (Aug. 4, 1998). 04-1244 Pet. App. 12a. Respondents, however, have never cited – or defended the Seventh Circuit's citation of – that unpublished opinion, which we showed at the petition stage to be inapposite. See 04-1244 Pet. 24-25 & n.10.

3. Finally, the panel suggested that limiting criminal liability under the Hobbs Act to acts or threats of physical violence "in furtherance of a plan or purpose to do anything in violation of" Section 1951 (18 U.S.C. § 1951(a)) would violate the "well-worn canon of statutory interpretation under which a court should avoid making one part of a statute meaningless." 04-1244 Pet. App. 14a. "Anyone who commits physical violence to a person or property in furtherance of a plan of robbery or extortion," the panel asserted, "would almost certainly be found to have attempted one of those crimes or, if others are involved, to have conspired to commit one or the other." *Ibid.* But that analysis is soundly refuted by the language of the 1946 Act (as well as the 1934 predecessor statute), both of which clearly required that acts or threats of violence be connected to either robbery or extortion. In both instances, Congress indisputably thought that the inclusion of this provision added something to the statute and was not a meaningless act.

And Congress was right. The final clause covers conduct not otherwise punishable under the statute. For example, it covers situations where a defendant engages in violence against property or people in preparatory conduct that is not punishable as an attempt. Under New York law (which served as a model for both the Hobbs Act and the 1934 Anti-Racketeering Act, see *Scheidler II*, 537 U.S. at 403-07 & nn.10 & 11), the require-

ments for the crime of attempt were stringent. In the leading case, *People* v. *Rizzo*, 158 N.E. 888 (N.Y. 1927), the court held that an attempt to commit robbery had not occurred when armed criminals drove around the city looking to rob a specific person, but could not find him. "[M]any acts in the way of preparation are too remote to constitute the crime of attempt," the court explained; "the law considers those acts only as tending to the commission of the crime which are so near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference." *Id.* at 889. Because the defendants did not come "dangerously near" to taking the victim's property, the convictions for attempted robbery were reversed. *Ibid.*[14]

Under New York's definition of the crime of attempt, preparatory conduct that includes acts or threats of violence against people or property frequently will not be enough to establish liability. Take the example of someone who wants to rob a factory who, several weeks before the planned robbery, violently breaks open the lock on the gate to the factory parking lot in the middle of night so that he can get a closer look at surveillance cameras and other security features outside of the building. Another example of a threat not rising to the level of an attempt would be "calling a bank guard the day before [a] planned robbery and saying, 'If you interfere with me when I rob the bank, I'll kill you,' but then taking no further steps to rob the bank." Bradley, *NOW v. Scheidler: RICO Meets The First Amendment*, 1994 SUP. CT. REV. 129, 143 n.77 (1994); see also *ibid.* (noting that it "is possible to imagine a case in which one threatens vio-

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[14] It was not until 1962 that the Model Penal Code ("MPC") ushered in a broader definition of the crime of attempt requiring only a "substantial step" toward the commission of the crime. See Batey, *Minority Report and the Law of Attempt*, 1 OHIO ST. J. CRIM. L. 689, 694-97 (Spring 2004) (discussing MPC § 5.01). New York, however, continues to follow the so-called "*Rizzo* rule." See *People* v. *Mahboubian*, 74 N.Y.2d 174, 191 (N.Y. 1989); *People* v. *Di Stefano*, 38 N.Y.2d 640, 652 (1976).

lence in furtherance of a personal plan to rob a bank (or commit extortion) without conspiring or attempting to rob a bank").[15]

The third clause also covers other situations not included within the other provisions of the Hobbs Act. It covers situations where the crime of attempt already has been completed, and the defendant uses acts or threats of violence either in retaliation for the victim's refusal to hand over the property or against other people (such as bystanders or the police) in an effort to avoid arrest or detection.[16] And it covers situations where a subordinate "enforcer" carries out a superior's order to threaten or damage property without knowing why he is doing so (thus making it difficult for the "enforcer" to be charged with conspiracy).[17] See *United States* v. *DiGregorio*, 605 F.2d 1184,

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[15] Oddly, in the very same article Professor Bradley also states that our reading of the Hobbs Act "makes no sense" and would "render[] the third clause nugatory." Bradley, 1994 SUP. CT. REV. at 142-43. The Seventh Circuit quoted and relied heavily on those statements (04-1244 Pet. App. 13a) without recognizing that they were elsewhere refuted in the same article. In any event, Professor Bradley's argument that Congress in 1946 intended to punish freestanding acts of violence is severely flawed. Among other defects, the article (1) fails to analyze the language of the Hobbs Act as enacted, which refutes the "freestanding" reading as well as the article's principal thesis about Congress's intent in 1946; (2) mistakenly relies on a passage from a 1945 House Report that referred to a *different* title from what would become the Hobbs Act in a larger, omnibus bill – a title never enacted (because the war ended and Congress was no longer interested in wartime saboteurs); and (3) addresses none of the many counterarguments set forth in this brief.

[16] The third clause covers a broader range of people and property ("any person or property") than does the robbery offense (covering only certain property owned by or in the possession or custody of the victim, or owned by "a relative or member of [the victim's] family," or owned by "anyone in the victim's company"; and covering violence against only those individuals). See 18 U.S.C. § 1951(a), (b)(1).

[17] In the most famous line from the most famous movie about racketeering – *The Godfather* – crime boss Michael Corleone tries to extort casino owner Moe Greene to sell a casino to the "Family." Greene refuses to sell. Corleone explains, "I'll make him an offer he can't refuse." After threats fail to persuade Green to sell, Corleone sends a gunman to shoot Greene in the face. THE GODFATHER (Paramount Pictures 1972) (transcript available at

1192 (1st Cir.), cert. denied, 444 U.S. 937 (1979) ("defendants succeeded in 'commit(ting) or threaten(ing) physical violence * * * in furtherance of a plan or purpose to' violate the act by extortion that affects commerce" where one defendant was hired as an enforcer to threaten, then beat, and then shoot the victim, and other defendants made threats to the victim).

Finally, even when there is overlap between other provisions of the Hobbs Act, the third clause serves a legitimate purpose by allowing prosecutors to bring multiple charges. See *Callanan* v. *United States*, 364 U.S. 587 (1961) (upholding convictions for both conspiracy to extort and extortion under the Hobbs Act); *United States* v. *Wilson*, 997 F.2d 208 (6th Cir. 1993) (defendant pleaded guilty to conspiracy to commit robbery *and* threat of violence in furtherance of that plan).

Taking a page from Professor Bradley's article, the panel brushed aside these arguments, reasoning that any subordinate enforcer would necessarily be covered by a conspiracy charge and observing: "It seems unlikely that Congress included the 'violence' language to capture such a tiny set of academic hypotheticals." 04-1244 Pet. App. 14a. There are at least two problems with that observation, however. First, even a "tiny" set of cases would be enough to defeat the surplusage argument. And second, had the panel looked, it would have found ample evidence in the congressional debates over both the Hobbs Act and the 1934 Anti-Racketeering Act of Congress's concern about violence inflicted by subordinate "enforcers" and by those whose attempts at robbery and extortion were not successful.[18]

<http://www.jgeoff.com/godfather/gf1/transcript/gf1transcript.html>). The gunman is an enforcer. The violence that he inflicts on Moe Greene would be covered by the "in furtherance of" clause in § 1951(a) even if – as is likely the case – the crime boss did not take the time to explain the reason that he wanted his low-level henchman to inflict physical violence on the victim.

[18] See, *e.g.*, 91 CONG. REC. 11,903 (1945) ("The consequences of your refusal were * * * [s]ometimes you would be beaten up and your truck overturned."); 91 CONG. REC. 11,905 (1945) (expressing concern about "actual physical assaults of a serious character" after failed extortion attempts); 91 CONG. REC. 11,908 (1945) ("Truck drivers have been beaten up and sent to the

III. RICO DOES NOT AUTHORIZE PRIVATE PLAINTIFFS TO SEEK INJUNCTIVE RELIEF

RICO was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (codified at 18 U.S.C. §§ 1961-1968). In addition to its criminal proscriptions, RICO includes a civil remedies provision, 18 U.S.C. § 1964, which authorizes the Attorney General (*id.* § 1964(b)) to initiate civil proceedings to remedy RICO violations. Section 1964(c) also authorizes any "person" who is "injured in his business or property" to bring suit and recover "threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c).[19]

In its prior decision issued in 2001, the Seventh Circuit became the first appellate court to hold that private injunctions are available. See 04-1244 Pet. App. 35a-43a. The lower court's reasons for breaking with 30 years of precedent, however, do not withstand analysis.

A. The Language And Structure Of 18 U.S.C. § 1964 Demonstrate That Private Plaintiffs Are Not Entitled To Injunctive Relief

1. Section 1964(c) allows private parties who are injured to bring suit for treble damages, costs, and attorneys' fees. As this Court has "repeatedly observed," "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws." *Holmes* v. *SIPC*, 503 U.S. 258, 267 (1992) (citing cases). "[E]ven a cursory comparison * * * reveals that the civil action provision of RICO was patterned after [Section 4 of] the

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hospitals. Some of them have been killed by these labor 'goons' and racketeers"); 89 CONG. REC. 3214 (1943) (Cong. Hobbs) ("farmers * * * fought off four goons"); 78 CONG. REC. 451 (1934) (recounting various retaliatory acts for resisting extortion schemes).

[19] For simplicity we use the terms "private party" and "person" interchangeably. There is, however, uncertainty about whether some governmental units are "persons" that may sue and be sued under civil RICO. See U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED & CORRUPT ORGANIZATIONS: A MANUAL FOR FEDERAL PROSECUTORS 36-37 & n.39 (2000) ("*DoJ RICO Manual*").

Clayton Act," *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143, 150-51 (1987), which, in turn, was "borrowed from Section 7 of the Sherman Act," *Holmes*, 503 U.S. at 267.

Section 1964(c) provides, in relevant part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor * * * and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee * * *.

When RICO was adopted in 1970, Section 4 of the Clayton Act provided, in relevant part (Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15(a)) (see App., *infra*, 7a)):

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

When the Clayton Act was adopted, Section 7 of the Sherman Act provided, in relevant part (Law of July 2, 1890, ch. 647, § 7, 26 Stat. 209, 210 (repealed 1955) (see App., *infra*, 6a)):

> Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor * * * and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

In *Paine Lumber Co.* v. *Neal*, 244 U.S. 459 (1917), *Minnesota* v. *Northern Securities Co.*, 194 U.S. 48 (1904), and other early cases, this Court repeatedly held that Section 7 of the Sherman Act did not allow parties other than the federal government to seek injunctive relief. Congress's intent "was to limit direct proceedings in equity to prevent and restrain such violations of the anti-trust act as cause injury to the general public, or to all alike, * * * to those instituted in the name of the

United States." *Northern Securities*, 194 U.S. at 71. "[A] private person cannot maintain a suit for an injunction under § 4 of the [Sherman Act]." *Paine Lumber*, 244 U.S. at 471; see also *Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 593 (1921); *D.R. Wilder Mfg. Co.* v. *Corn Prods. Refining Co.*, 236 U.S. 165, 174-75 (1915); *United States* v. *Cooper Corp.*, 312 U.S. 600, 608 & n.9 (1941) (Sherman Act "envisaged two classes of actions[] – those made available only to the Government, which are first provided in detail, and, in addition, a right of action for treble damages granted to redress private injury").

A *different* provision of the Clayton Act – not the model for Section 1964(c) or any other provision of RICO – expressly authorizes private injunctive relief. Section 16 of the Clayton Act provides, in relevant part, "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief * * * against threatened loss or damage by a violation of the antitrust laws * * *." Clayton Act, ch. 323, § 16, 38 Stat. 730, 737 (1914) (codified at 15 U.S.C. § 26) (see App., *infra*, 7a-8a). "[T]he sole purpose of § 16 * * * was to extend to private parties the right to sue for injunctive relief." *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 634 n.5 (1977) (plurality); *California* v. *American Stores Co.*, 495 U.S. 271, 287 (1990).

This Court credits "Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4." *Holmes*, 503 U.S. at 268. Congress "used the same words," so "we can only assume it intended them to have the same meaning that courts had already given them." *Ibid.*; see also *Associated Gen. Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 534 (1983) ("When Congress enacted § 4 of the Clayton Act * * * it adopted the language of § 7 [of the Sherman Act] and presumably also the judicial gloss * * *.").

This Court has repeatedly relied on Congress's decision to model Section 1964(c) after these antitrust precursors in determining the meaning of RICO's civil enforcement scheme. See

Holmes, 503 U.S. at 267 (Section 1964(c) includes a proximate causation requirement because federal courts had read a similar requirement into the precursor provisions of the Sherman and Clayton Acts); *Agency Holding*, 483 U.S. at 150-56 (Clayton Act's 4-year statute of limitations applies to suits brought under Section 1964(c)); *Rotella* v. *Wood*, 528 U.S. 549, 559 (2000) (RICO's "civil enforcement scheme parallel to the Clayton Act regime" incorporates antitrust accrual precedent); *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 188-91 (1997).

The reasons to rely on the antitrust models are especially strong in this case. This case does not involve filling in an indispensable concept left out of civil RICO (such as the statute of limitations) with a principle taken from Section 4 of the Clayton Act. Instead, it involves the meaning of *statutory language* – creating a private right of action for treble damages and specifying the available remedies – that is *virtually identical* in Section 1964(c) and its antitrust predecessor provisions.

In "reject[ing] this line of analysis," the Seventh Circuit gave two utterly implausible reasons. 04-1244 Pet. App. 42a. First, the panel stated that "the mere fact that the Clayton Act spreads it remedial provisions over a number of different sections of the U.S. Code and RICO does not, adds little to our understanding of either statute." *Id.* at 42a-43a. But Congress did not carve up language in one statute and reallocate it to different places in another; one statute (the Clayton Act) has entirely *different* language – specifically authorizing private injunctive relief – that is not included *anywhere* in RICO.

Second, the court of appeals reasoned that this Court has "regularly treat[ed] the remedial sections of RICO and the Clayton Act identically, regardless of superficial differences in language." 04-1244 Pet. App. 43a (citing *Klehr* and *Holmes*). But the inclusion of the express authorization of private injunctive relief in Section 16 of the Clayton Act, contrasted with its omission from RICO, is hardly a "superficial difference[] in language." And the remedial provisions of RICO that *Klehr* and *Holmes* "treated * * * identically" are Section 1964(c) of RICO

and Section 4 of the Clayton Act. That any wording difference in *those* two provisions is "superficial" proves our point.

2. The Seventh Circuit purported to find evidence to support its reading in the remainder of Section 1964 – and in particular in Sections 1964(a) and (b). That was error.

Sections 1964(a) and (b) provide:

> (a) The district courts of the United States shall have *jurisdiction* to *prevent and restrain* violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person * * * ; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General *may institute proceedings under this section*. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

18 U.S.C. § 1964(a), (b) (emphasis added).

The notion that Congress's inclusion of subsections (a) and (b) reflects an intent to *expand* the meaning of Section 1964(c) beyond its antitrust-law precursors faces an insurmountable problem: both the Sherman Act and the Clayton Act *also* included provisions (1) granting equitable jurisdiction to the district courts to "prevent and restrain" violations and (2) authorizing the United States to "institute proceedings" under those statutes. Law of July 2, 1890, ch. 647, § 4, 26 Stat. 209 (current version at 15 U.S.C. § 4); Clayton Act, ch. 323, § 15, 38 Stat. 730, 736-37 (1914) (current version at 15 U.S.C. § 25); see App., *infra*, 6a-7a. In the Clayton Act, Congress saw fit to add a separate provision – Section 16 – which expressly grants private parties the right to seek injunctive relief. Clayton Act,

§ 16, 38 Stat. 737 (App., *infra*, 7a). RICO, by contrast, contains no such provision. Sections 1964(a) and (b) accordingly reflect no intent to authorize private injunctive relief.

Indeed, the close parallels between Sections 1964(a) and (b) on the one hand and analogous provisions in both the Sherman and Clayton Acts further confirm the inappropriateness of relying on Sections 1964(a) and (b) as a source of authority for private injunctive relief. Plainly, the same argument could have been made – and was made and rejected – in this Court's early Sherman Act cases disallowing private injunctive relief. See, *e.g.*, *Paine Lumber*, 244 U.S. at 471. When it enacted RICO, Congress was presumptively aware of this Court's well-established construction of the antitrust models for Sections 1964(a) and (b).

Even apart from this historical context, which the Seventh Circuit ignored, the language of Sections 1964(a) and (b) does not support the result below. Although Section 1964(a) provides that district courts "shall have jurisdiction to" order a variety of equitable remedies, it does not state who is entitled to invoke that jurisdiction. Section 1964(b) broadly authorizes the Attorney General to "institute proceedings" under Section 1964. According to the Seventh Circuit, the Attorney General's authority to seek permanent injunctive relief "comes from the combination of the grant of a right of action to the Attorney General in § 1964(b) and the grant of district court authority to enter injunctions in § 1964(a)." 04-1244 Pet. App. 38a.[20]

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[20] The Attorney General's unrestricted right to "institute proceedings under this section" necessarily carries with it the right to seek all available equitable remedies that federal courts have jurisdiction to grant pursuant to Section 1964(a). Indeed, the reference to "proceedings" in Section 1964(b) is almost certainly an abbreviation for "proceedings in equity," the term used in the precursor provisions of the Sherman and Clayton Acts after which Section 1964(b) was modeled. See Law of July 2, 1890, ch. 647, § 4, 26 Stat. 209 (current version at 15 U.S.C. § 4); Clayton Act, ch. 323, § 15, 38 Stat. 730, 736-37 (1914) (current version at 15 U.S.C. § 25). The "prevent and restrain" language of Section 1964(a) similarly reveals a focus on proceedings in equity (as opposed to the "suit[s]" for "damages" authorized under Section 1964(c)). See also *Organized Crime Control: House Hearings*

The Seventh Circuit concluded "that private parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c)," 04-1244 Pet. App. 38a, but that analysis overlooks key evidence in the statutory text. In contrast to Section 1964(b)'s broad authorization allowing the Attorney General to "institute proceedings under this section" and therefore to invoke the injunctive relief district courts are empowered to issue in such proceedings by virtue of Section 1964(a), Section 1964(c) provides a far more circumscribed right of action. It permits any person who has been "injured in his business or property" as a consequence of "a violation of section 1962 of this chapter" to "sue *therefor*"[21] and specifies that in such a lawsuit the plaintiff "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." In contrast to Section 1964(b), Section 1964(c) can – and should – be read as an exhaustive list of the remedies available to a "person" authorized to sue for past injuries to "business or property."

Where, as here, Congress did not allow private parties to "institute proceedings under this section," but rather only to sue for treble damages and other specified relief, the inference is inescapable that Congress did not intend to allow private parties to invoke the equitable jurisdiction conferred by Section 1964(a). See also pages 46-49, *infra* (describing repeated, unsuccessful proposals to add language to Section 1964 authorizing private parties to "institute proceedings under subsection (a)").

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on S. 30 Before the House Comm. on the Judiciary, 91st Cong., 2d Sess. 520 (1970) (statement of Rep. Steiger) (describing Section 1964(c) as "similar to the private damage remedy found in the anti-trust laws" and explaining that "those who have been wronged by organized crime should at least be given access to a *legal* remedy") (emphasis added).

[21] At the oral argument in *Scheidler II*, the Court raised the question whether the "term of art" "sue therefor" language in Section 1964(c) also appears in the provision of the Clayton Act that has been held not to authorize private injunctive relief. Oral Arg. Tr. 22. It does. See App., *infra*, 5a.

The legislative history of RICO further demonstrates the error of the Seventh Circuit's view that Section 1964(c) must, "by parity of reasoning" (04-1244 Pet. App. 38a), be regarded as bearing the same relationship to Section 1964(a) as does Section 1964(b). That analysis again overlooks the antitrust models on which Section 1964 was based. Both the Sherman Act and the Clayton Act combined in a single provision the predecessor language on which Sections 1964(a) and (b) were modeled. See Law of July 2, 1890, ch. 647, § 4, 26 Stat. 209 (current version at 15 U.S.C. § 4); Clayton Act, ch. 323, § 15, 38 Stat. 730, 736-37 (1914) (current version at 15 U.S.C. § 25). And both included as an entirely separate provision the model for Section 1964(c). This common origin suggests a special relationship between subsections (a) and (b) not shared by subsection (c).

Furthermore, as this Court has acknowledged, the Senate version of the bill that became RICO allowed the Attorney General to seek injunctive relief in civil cases, but did not provide any cause of action for private parties. *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 486 (1985). The private treble-damages provision was later added by the House Judiciary Committee and approved by the House. *Id.* at 487-88. In the final version of RICO, the Senate provisions became Sections 1964(a), (b), and (d), *id.* at 486-87, while the House provision became Section 1964(c), *id.* at 487-88. As that history makes clear, Section 1964(c) was a limited, private remedy engrafted onto a preexisting remedial scheme. See *Kaushal* v. *State Bank of India*, 556 F. Supp. 576, 583 (N.D. Ill. 1983); see also *In re Fredeman Litigation*, 843 F.2d 821, 829 (5th Cir. 1988). As such, it necessarily bears a different relationship to Section 1964(a) than does Section 1964(b).[22]

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[22] The Seventh Circuit's reliance on RICO's liberal construction clause and the "underlying purposes" of the statute (04-1244 Pet. App. 40a) was misplaced. As this Court has stated, the liberal construction clause "is not an invitation" to depart from Congress's intent as "gleaned from the statute through the normal means of interpretation." *Reves* v. *Ernst & Young*, 507 U.S. 170, 183-84 (1993); see also *Fredeman Litig.*, 843 F.2d at 830 (liberal construction clause "neither compels nor authorizes" court to "disregard

3. Even read in a vacuum, Section 1964(c) would not support the Seventh Circuit's reading. In recent years, this Court has repeatedly emphasized that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001); see also *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979); *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). Given that Congress explicitly granted private parties the right to seek treble damages, costs, and attorneys' fees, granting additional rights would be manifestly inappropriate. See generally *United States* v. *Philip Morris*, 396 F.3d 1190, 1200-01 (D.C. Cir. 2005), petition for cert. pending, No. 05-92.

B. Other Evidence In The Legislative History Confirms Congress's Intent Not To Allow Private Parties To Seek Injunctive Relief

This Court has looked to legislative history in interpreting RICO. *E.g.*, *Rotella*, 528 U.S. at 557; *Reves* v. *Ernst & Young*, 507 U.S. 170, 179-83 (1993); *Holmes*, 503 U.S. at 267; *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 238-39 (1989). RICO's legislative history confirms that Congress did not intend to authorize private parties to seek injunctive relief.

1. The Senate and House entertained but did not adopt proposals that would have expressly given private parties the right

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convincing evidence from the legislative history that Congress believed it had not approved private injunctive remedies and balked at so doing"). Nor does RICO's "underlying purpose" trump the clear evidence in the text, structure, and legislative history of the statute that Congress did not intend to authorize private injunctive relief. In any event, Congress's purpose in enacting Section 1964(c) was both to "remedy economic injury" and to "bring to bear the pressure of 'private attorneys general' on a serious national problem." *Agency Holding*, 483 U.S. at 151. As this Court has pointed out, "the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages." *Ibid.*; accord *Rotella*, 528 U.S. at 557-58. Moreover, as the Court recently stated, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Great-West Life & Annuity Ins.* v. *Knudson*, 534 U.S. 204, 220 (2002) (quotation omitted).

to seek injunctive relief. In the Senate, S. 1623, a predecessor to RICO, included "a private civil cause of action * * * providing explicitly for injunctive relief as well as for treble damages." *Sedima S.P.R.L.*, v. *Imrex Co.*, 741 F.2d 482, 488 n.18 (2d Cir. 1984), rev'd on other grounds, 473 U.S. 479 (1985); see S. 1623, §§ 3(c), 4(a), 91st Cong., 1st Sess. (1969); 115 CONG. REC. 6995-96 (1969). So, too, did an earlier Senate bill. See S. 2049, §§ 4(c), 5(a), 90th Cong., 1st Sess. (1967); see also *Sedima*, 473 U.S. at 486-87. "The Senate Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary replaced S.1623 with S.1861," which did not provide a private civil cause of action. *Sedima*, 741 F.2d at 488 n.18. The bill as passed by the Senate, S. 30, also lacked a private civil cause of action. *Sedima*, 473 U.S. at 486-87.

Competing bills were also introduced in the House. See, *e.g.*, H.R. 19215, 91st Cong., 2d Sess. (1970); H.R. 19586, 91st Cong., 2d Sess. (1970). Like S. 1623 and S. 2049, H.R. 19215 included separate subsections authorizing private parties to recover, respectively, treble damages and injunctive relief. In contrast, H.R. 19586 included a provision authorizing only treble damages. "The language of RICO as enacted into law is identical to the language of H.R. 19586." Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts – Criminal and Civil Remedies*, 53 TEMPLE L.Q. 1009, 1020 n.63 (1980) ("*Basic Concepts*").

Moreover, during the hearings of the House subcommittee to consider S. 30 and other measures, Representative Steiger proposed that the committee add to S. 30 not only a private treble-damages provision but also a separate provision authorizing private injunctive relief. *Organized Crime Control: House Hearings on S. 30 Before the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 520-21 (1970); see also 116 CONG. REC. 35,346 (1970). As reported out of the Judiciary Committee, however, the bill did not include this provision. See *Sedima*, 741 F.2d at 489 n.20 (noting that subcommittee had "rejected this language and explicitly created only the private action for treble damages which was eventually enacted as § 1964(c)").

On October 6, 1970, on the floor of the House, Representative Steiger proposed an amendment to the bill that would have added the provision quoted in the preceding paragraph (as well as other provisions, including one drawn from the Clayton Act, as amended, that would have authorized the United States to sue for actual damages). 116 CONG. REC. 35,227-28 (1970). He pointed out that he had urged the subcommittee to "add * * * the additional civil remedies now provided by law for antitrust cases," which "include treble damages actions by private citizens who have been harmed in their business or property, suits for equitable relief for private citizens threatened with such injury, and actions by the United States for actual damages to its business or property." *Id.* at 35,227. He criticized the reported bill on the ground that it "does not do the whole job. It makes the mistake of merely authorizing [treble-damage] suits * * * without granting to the courts the full extent of remedial authority contained in the comparable antitrust laws." *Ibid.* He continued, "the Judiciary Committee version * * * *fails to provide* * * * important substantive remedies included in the Clayton Act: * * * *equitable relief in suits brought by private citizens*." *Id.* at 35,228 (emphasis added).

During floor debate the next day, Representative Steiger again proposed but later withdrew his amendment to the bill. 116 CONG. REC. 35,346-47 (1970). In urging withdrawal, Representative Poff pointed out that the amendment "offer[ed] an additional civil remedy"; noted that "prudence would dictate that the Judiciary Committee very carefully explore the potential consequences that this new remedy might have in all the ramifications which this legislation contains"; and suggested that withdrawal would permit the new remedies to be "properly * * * considered by the Judiciary Committee when Congress reconvenes following the elections." *Id.* at 35,346. In agreeing to this course of action, Representative Steiger stated: "I would like to make it very clear that this is worthy of separate legislation when we do return in the fall or next year." *Id.* at 35,347.

2. The following year, Senators McClellan and Hruska (who introduced the bill that eventually became RICO, see

Agency Holding, 483 U.S. at 155) introduced S. 16, the Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972, which included a proposed amendment to Section 1964. See 118 CONG. REC. 29,369-70 (1972) (statement of Sen. McClellan). The bill would have added to Section 1964 a provision authorizing private injunctive relief that was virtually identical to the amendment offered by Representative Steiger. Compare *id.* at 29,368 with 116 CONG. REC. 35,346 (1970). As this Court has recognized, "the purpose of the bill was to broaden even further the remedies available under RICO" by "permit[ing] private actions for injunctive relief" and other remedies. *Agency Holding*, 483 U.S. at 155 (citing 118 CONG. REC. 29,368 (1972)). There is ample other evidence in the legislative record confirming that conclusion. See *Religious Tech. Ctr.* v. *Wollersheim*, 796 F.2d 1076, 1086 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987); see also Br. for Operation Rescue, at 26-30. The Senate passed the bill unanimously, *Basic Concepts* at 1020 n.67 (citing 118 CONG. REC. 29,379 (1972)), but the House did not act on the bill. *Ibid.* RICO, therefore, was never amended.

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987); see also *Chickasaw Nation* v. *United States*, 534 U.S. 84, 93 (2001) (courts "ordinarily will not assume that Congress intended to enact statutory language that it has earlier discarded in favor of other language") (quotations omitted); *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983). In ignoring that principle, the Seventh Circuit erred.

C. Allowing Private Parties To Seek Injunctive Relief Under Section 1964(a) Would Vastly Expand The Scope Of Civil RICO

In the Seventh Circuit's view, "Congress intended the general remedies explicitly granted in § 1964(a)" – including but *not* limited to injunctions – "to be available to all plaintiffs."

04-1244 Pet. App. 39a. That conclusion would arm private litigants with far-reaching and novel equitable remedies. Without good evidence that Congress intended to bring about that extraordinary result, this Court should hesitate to approve it.

Section 1964(a) vests the district courts with broad jurisdiction to "issu[e] appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person * * *; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons." 18 U.S.C. § 1964(a).

In civil RICO actions brought by the United States, the federal courts have granted a broad range of equitable remedies to prevent racketeering activity and eliminate corruption from labor unions and other entities. See *DoJ RICO Manual*, at 283-97 (describing case law). Consistent with the language of Section 1964(a), courts have ordered the divestiture of interests held in a racketeering enterprise. *Id.* at 285-86 & n.10 (citing cases). And they have prohibited defendants, at the request of the government, from pursuing their livelihood in certain geographic areas, associating with co-defendants for commercial purposes, or participating in union activities. See, *e.g.*, *United States* v. *Carson*, 52 F.3d 1173, 1184-85 (2d Cir. 1995), cert. denied, 516 U.S. 1122 (1996). Moreover, the federal courts have at the government's request "frequently appointed officers, also referred to as monitors or trustees, to supervise the activities of the [RICO] enterprise." *DoJ RICO Manual*, at 284.

What is more, Section 1964(a) expressly authorizes the government to seek corporate *dissolution*. In *California* v. *American Stores Co.*, 495 U.S. 271 (1990), this Court held that Congress's broad authorization under Section 16 of the Clayton Act allowing private parties to "have injunctive relief" included the remedy of divestiture. At the same time, however, the Court distinguished the more drastic or "grave" remedy of corporate dissolution in the sense of an order "terminat[ing] the corporate

existence." *Id.* at 292-93; *id.* at 289 (likening dissolution to a "judgment * * * of corporate death") (internal quotations omitted). As the Court noted in *American Stores*, there are strong reasons to believe that private plaintiffs are *not* entitled to the remedy of dissolution under Section 16 of the Clayton Act. *Id.* at 290-94 (citing *Graves* v. *Cambria Steel Co.*, 298 F. 761 (N.Y. 1924) (Hand, J.)). If so, then it is difficult to fathom why Congress would have authorized such a drastic remedy for private parties in Section 1964(a) of RICO. In fact, Congress's express provision of the dissolution remedy in Section 1964(a) goes far toward confirming that private parties are not entitled to invoke the equitable jurisdiction conferred by that subsection.[23]

CONCLUSION

The judgment of the court of appeals should be reversed.

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[23] Unlike federal prosecutors, private plaintiffs are not responsible for acting in the public interest or ultimately accountable to the electorate. See *Northern Securities*, 194 U.S. at 71 (exclusive government authority to seek permanent injunctive relief under Sherman Act ensures that this extraordinary remedy will be deployed "according to some uniform plan, operative throughout the entire country"). In the hands of private plaintiffs, the far-reaching equitable remedies available under RICO (including corporate dissolution) could have a devastating effect on individual, business, and organizational defendants.

APPENDIX

The Hobbs Act, 18 U.S.C. § 1951, as amended, provides in full:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section –
>
> > (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
> >
> > (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
> >
> > (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

The Hobbs Act, Pub. L. No. 486, 60 Stat. 420 (1946), as originally enacted and before the 1948 revisions, provided:

SEC. 1. As used in this title –

(a) The term 'commerce' means (1) commerce between any point in a State, Territory, or the District of Columbia and any point outside thereof, or between points within the same State, Territory, or the District of Columbia but through any place outside thereof, and (2) commerce within the District of Columbia or any Territory, and (3) all other commerce over which the United States has jurisdiction; and the term 'Territory' means any Territory or possession of the United States.

(b) The term 'robbery' means the unlawful taking or obtaining of personal property, from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or anyone in his company at the time of the taking or obtaining.

(c) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

SEC. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

SEC. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

SEC. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

SEC. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

SEC. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both.

The Federal Anti-Racketeering Act of 1934, 48 Stat. 979, ch. 569, provided in pertinent part:

§ 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce –

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages of a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in

furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

The New York Penal Law of 1909 provided in pertinent part:

§ 530. Coercing another person a misdemeanor

A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or abstain from doing, wrongfully and unlawfully,

1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury; or,

2. Deprives any such person of any tool, implement or clothing or hinders him in the use thereof; or,

3. Uses or attempts the intimidation of such person by threats or force,

Is guilty of a misdemeanor.

* * * * *

§ 850. Extortion defined.

Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

* * * * *

§ 852. Punishment of extortion.

A person who extorts any money or other property from another, under circumstances not amounting to robbery, by means of force or a threat mentioned in the last two sections, is punishable by imprisonment not exceeding fifteen years.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, provides in relevant part:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee * * * .

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant

from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

The Sherman Act of 1890 (Law of July 2, 1890, ch. 647, 26 Stat. 209), provided in pertinent part:

§ 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. [current version at 15 U.S.C. § 4]

* * * * *

§ 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee. [repealed 1955]

The Clayton Act of 1914 (ch. 323, 38 Stat. 730), provides in pertinent part:

> § 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [current version at 15 U.S.C. § 15(a)]
>
> * * * * *
>
> § 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. * * * [current version at 15 U.S.C. § 25]
>
> § 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and

upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue * * * . [current version at 15 U.S.C. § 26]

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(15) (13)

Nos. 04-1244 & 04-1352

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER OPERATION RESCUE

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QUESTIONS PRESENTED

In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court held that "all of the predicate acts supporting the jury's finding of a RICO violation must be reversed," that therefore "the judgment that petitioners violated RICO must also be reversed," and that "[w]ithout an underlying RICO violation, the injunction issued by the district court must necessarily be vacated." *Id.* at 411. On remand, however, the Seventh Circuit held that all of the predicate acts were *not* reversed, and that an injunction under RICO might yet be sustained against petitioners on the basis of the supposedly unreversed predicate acts. The questions presented are:

1. Did the Seventh Circuit defy this Court's mandate?
2. Did the Seventh Circuit err by ruling, in conflict with the Sixth and Ninth Circuits, and in conflict with the official position of the Department of Justice, that the federal Hobbs Act, 18 U.S.C. § 1951, may plausibly be construed to prohibit, without any connection to robbery or extortion, any act or threat of "physical violence to any person or property" that "in any way or degree . . . affects commerce"?
3. Did the Seventh Circuit err by ruling, in conflict with the Ninth Circuit, and in conflict with the official position of the Department of Justice, that private civil litigants may obtain injunctive relief under the federal Racketeer Influenced and Corrupt Organizations (RICO) statute?

PARTIES

In addition to petitioner (in No. 04-1352) Operation Rescue (OR),[1] the following parties were defendants-appellants in the Seventh Circuit and are petitioners (in No. 04-1244) here:

Joseph M. Scheidler
Pro-Life Action League, Inc.
Andrew D. Scholberg
Timothy Murphy

The National Organization for Women, Inc. (NOW), respondent in Nos. 04-1244 & 04-1352 and plaintiff-appellee below, sued on behalf of itself and its members and was certified as representative of the plaintiff "class of women who are not NOW members and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities." OR Pet. App. 91a n.12. In addition, there are two other named respondents (in Nos. 04-1244 & 04-1352), the Delaware Women's Health Organization, Inc. (DWHO) and the Summit Women's Health Organization, Inc. (Summit). Both DWHO and Summit sued on behalf of themselves and were certified as representatives of the plaintiff "class of all women's health centers in the United States at which abortions are performed." *Id.* These respondents, like NOW, were plaintiffs-appellees in the Seventh Circuit.

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[1]Operation Rescue is not a corporation. *See* S. Ct. Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES vii

DECISIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. THIS COURT'S DECISION IN *SCHEIDLER II* DEFINITIVELY DISPOSED OF THIS CASE IN ITS ENTIRETY. 8

II. THE HOBBS ACT DOES NOT PROHIBIT VIOLENCE WHOLLY APART FROM ANY ROBBERY OR EXTORTION. 12

A. The Text of the Hobbs Act Precludes a "Violence Alone" Construction. 12

B. Both of the Other Circuits to Address the Question, as Well as the Department of Justice, Reject a "Violence Alone" Construction. 14

C. Federalism Concerns Preclude a "Violence Alone" Construction. 15

D. The Rule of Lenity Precludes a "Violence Alone" Construction. 16

III. RICO DOES NOT AUTHORIZE PRIVATE INJUNCTIVE RELIEF. 18

A. RICO's Statutory Text Gives the Attorney General Exclusive Authority to Seek Injunctive Relief. 19

1. The text and structure of RICO's remedial provisions preclude private injunctive relief. 19

2. The remedial provisions of RICO were borrowed directly from remedial provisions of antitrust statutes that do not authorize private injunctive relief. 22

B. RICO's Legislative History Shows Congress Repeatedly and Deliberately Declined to Authorize Private Injunctive Relief. 26

1. Congress specifically selected treble damages as the exclusive remedy for private RICO suits. 26

2. Congress repeatedly considered, but failed to adopt, a private injunctive remedy under RICO. 27

C. The Counterarguments in Favor of Private Injunctive Relief Under RICO Lack Merit. 30

1. The word "and" does not create a private injunctive remedy. 31

2. Subsection (a) of § 1964 does not create a private injunctive remedy. . . . 33

3. RICO's "liberal construction" clause and general purposes do not create a private injunctive remedy. 35

D. The United States as Amicus in *Scheidler II* Officially Opposed Construing RICO to Authorize Private Litigants to Invade the Attorney General's Exclusive Prerogative to Seek Equitable Relief. 36

IV. THIS COURT SHOULD LEAVE NO DOUBT THAT THIS CASE IS OVER. 38

CONCLUSION 40

TABLE OF AUTHORITIES

Page

CASES

Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987) 22, 25, 27, 28, 29

Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987) 10

Beck v. Prupis, 529 U.S. 494 (2000) 25

California v. American Stores Co., 494 U.S. 271 (1990) 24

Chambers Dev. Co. v. Browning-Ferris Indus., 590 F. Supp. 1528 (W.D. Pa. 1984) 30, 31

City of Rancho Palos Verdes v. Abrams, 125 S. Ct. 1453 (2005) 21

Cleveland v. United States, 531 U.S. 12 (2000) 17

Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123 (D.N.J. 1989) 31

DeMent v. Abbott Capital Corp., 589 F. Supp. 1378 (N.D. Ill. 1984) 19, 33

First Nat'l Bank and Trust Co. v. Hollingsworth, 701 F. Supp. 701 (W.D. Ark. 1988) 30

Gregory v. Ashcroft, 501 U.S. 452 (1991) 15

Holmes Group Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002) 35

Holmes v. SIPC, 503 U.S. 258 (1992) 22, 29

In re Fredeman Litig., 843 F.2d 821 (5th Cir. 1988) 19, 26, 35

In re Managed Care Litigation, 298 F. Supp. 2d 1259 (S.D. Fla. 2003) 31

Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) 21

Jones v. United States, 529 U.S. 848 (2000) 15

Kaushal v. State Bank of India, 556 F. Supp. 576 (N.D. Ill. 1983) 19, 32, 33

Klehr v. A. O. Smith Harvestore Products, Inc., 521 U.S. 179 (1997) 25

Leocal v. Ashcroft, 125 S. Ct. 377 (2004) 17

McCormick v. United States, 500 U.S. 257 (1991) 17

McNally v. United States, 483 U.S. 350 (1987) 17

Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981) 21

Minnesota v. Northern Sec. Co., 194 U.S. 48 (1904) 23, 33, 34

Motorola Credit Corp. v. Uzan, 202 F. Supp. 2d 239 (S.D.N.Y. 2002), *remanded* 322 F.3d 130 (2d Cir. 2003) (per curiam) 31

National Organization for Women, Inc. v. Scheidler, 765 F. Supp. 973 (N.D. Ill. 1991) 1

National Organization for Women, Inc. v. Scheidler, 968 F.2d 612 (7th Cir. 1992) 1

National Organization for Women, Inc. v. Scheidler, 508 U.S. 971 (1993) 1

National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) 1, 2

National Organization for Women, Inc. v. Scheidler, 897 F. Supp. 1047 (N.D. Ill. 1995) 1, 3, 30

National Organization for Women, Inc. v. Scheidler, 172 F.R.D. 351 (N.D. Ill. 1997) 1

National Organization for Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001) . . . . . 1, *passim*

National Organization for Women, Inc. v. Scheidler, 91 Fed. Appx. 510, 2004 U.S. App. LEXIS 4020 (7th Cir. Feb. 26, 2004) 1, 4, 5, 9

National Organization for Women, Inc. v. Scheidler,
396 F.3d 807 (7th Cir. 2005) ..... 1, *passim*

Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453 (1974) 21

New York v. United States, 505 U.S. 144 (1992) 15

P.R.F., Inc. v. Philips Credit Corp.,
No. CIV 92-2266CCC, 1992 WL 385170
(D.P.R. Dec. 21, 1992) 30

Paine Lumber Co. v. Neal, 244 U.S. 459 (1917) 23, 33

Raygor v. Regents of the Univ. of Minn.,
534 U.S. 533 (2002) 15

Religious Technology Center v. Wollersheim,
796 F.2d 1076 (9th Cir. 1986), *cert. denied*,
479 U.S. 1103 (1987) 19, 27, 30, 33

Reves v. Ernst & Young, 507 U.S. 170 (1993) 29, 35

Rotella v. Wood, 528 U.S. 549 (2000) 25

Russello v. United States, 464 U.S. 16 (1983) 20, 21, 29

Scheidler v. National Organization for Women, Inc.,
535 U.S. 1016 (2002) 1

Scheidler v. National Organization for Women, Inc.,
537 U.S. 393 (2003) ..... i, *passim*

Sedima, S.P.R.L. v. Imrex, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985) 19, 29, 32, 33

Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 22, 25, 26, 27

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1990) 34

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) ... 34

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 21

United States v. Bass, 404 U.S. 336 (1971) 15

United States v. Enmons, 410 U.S. 396 (1973) 16, 17

United States v. Franks, 511 F.2d 25 (6th Cir. 1975) ... 14, 15

United States v. Kozminski, 487 U.S. 931 (1988) 17

United States v. Staszcuk, 517 F.2d 53 (7th Cir.), *cert. denied*, 423 U.S. 837 (1975) 16

United States v. Yankowski, 184 F.3d 1071 (9th Cir. 1999) 15

University of Texas v. Camenisch, 451 U.S. 390 (1981) ... 10

Vietnam Veterans of America, Inc. v. Guerdon Indus., Inc., 644 F. Supp. 951 (D. Del. 1986) 31